TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 798

THE SIOUX TRIBE OF INDIANS, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED DECEMBER 12, 1941.

CERTIORARI GRANTED FEBRUARY 9, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 798

THE SIOUX TRIBE OF INDIANS, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX.

	Original	Print
Record from Court of Claims	1	1
Separated amended petition	2	1
General traverse	11	6
Argument and submission of case	11	7
Special findings of fact	13	7
Conclusion of law	26	20
Opinion of the court, Whaley, C. J.	26	20
Judgment	37	30
Proceedings after entry of judgment	39	30
Order settling the record	41	31
Portions of record material to errors assigned	42	31
Plaintiff's request for record	43	31
Extracts from reports of Commissioner of Indian Affairs for years 1873, 1874, 1875, 1876 and 1878	44	32
Defendant's request for record	47	34
Letter from Assistant Secretary of the Interior to the Attorney General, dated August 9, 1939	48	35
Defendant's Exhibit No. 2—Letter from Edw. P. Smith, Commissioner, to the Secretary of the Interior, dated January 8th	50	36

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 17, 1941.

—7943

Record from Court of Claims—Continued
Portions of record material to errors assigned—Continued
Defendant's request for record—Continued

	Original	Print
Defendant's Exhibit No. 3—Letter from the Acting Secretary of the Interior to the President, dated January 9, 187–	51	37
Defendant's Exhibit No. 4—Letter from Acting Secretary of the Interior to the Commissioner of Indian Affairs, dated January 12, 1875	52	37
Defendant's Exhibit No. 5—Letter from Edw. P. Smith, Commissioner, to H. F. Livingston, U. S. Indian Agent, dated January 14th	53	38
Defendant's Exhibit No. 6—Letter from Edw. P. Smith, Commissioner, to Edmond Palmer, U. S. Indian Agent, dated January 14th	54	38
Defendant's Exhibit No. 7—Letter from Edw. P. Smith, Commissioner, to H. W. Bingham, U. S. Indian Agent, dated January 14th	55	38
Defendant's Exhibit No. 8—Letter, Edw. P. Smith, Commissioner, to the Secretary of the Interior, dated March 13th	56	39
Defendant's Exhibit No. 9—Letter from Secretary of the Interior to the President, dated March 15, 1875	58	40
Defendant's Exhibit No. 10—Letter from Secretary of the Interior to the Commissioner of Indian Affairs, dated March 16, 1875	59	40
Defendant's Exhibit No. 11—Letter from Edw. P. Smith, Commissioner, to E. A. Howard, U. S. Indian Agent, dated March 9th	60	41
Defendant's Exhibit No. 12—Letter from Edw. P. Smith, Commissioner, to H. F. Livingston, U. S. Indian Agent, dated March 10th	61	41
Defendant's Exhibit No. 13—Letter from Edw. P. Smith, Commissioner, to Commissioners of the General Land Office, dated March 19th	62	41
Defendant's Exhibit No. 14—Letter from Edw. P. Smith, Commissioner, to J. J. Saville, U. S. Indian Agent, dated March 19th	63	42
Defendant's Exhibit No. 15—Letter, from Edw. P. Smith, Commissioner, to H. W. Bingham, U. S. Indian Agent, dated March 19th	64	42
Defendant's Exhibit No. 16—Letter from Edw. P. Smith, Commissioner, to Edmond Palmer, U. S. Indian Agent, dated March 19th	65	42
Defendant's Exhibit No. 17—Letter from John L. Pennington, Governor of the Territory of Dakota, to the Commissioner of Indian Affairs, dated April 29, 1875	66	43

	Original	Print
Record from Court of Claims—Continued		
Portions of record material to errors assigned—Continued		
Defendant's request for record—Continued		
Defendant's Exhibit No. 18—Letter from Secretary of the Interior to the Commissioner of Indian Affairs, dated May 4th	67	43
Defendant's Exhibit No. 19—Letter from Edw. P. Smith, Commissioner, to H. F. Livingston, U. S. Indian Agent, dated May 8th	68	44
Defendant's Exhibit No. 20—Letter from Edw. P. Smith, Commissioner, to H. W. Bingham, U. S. Indian Agent, dated May 8th	69	45
Defendant's Exhibit No. 21—Letter from Secretary of War to the Secretary of the Interior, dated May 13, 1875	70	45
Defendant's Exhibit No. 22—Letter from Edw. P. Smith, Commissioner, to Secretary of the Interior, dated May 18	73	46
Defendant's Exhibit No. 23—Letter from Acting Secretary of Interior to the President, dated May 19, 1875	75	47
Defendant's Exhibit No. 24—Letter from Acting Secretary of the Interior to the Commissioner of Indian Affairs, dated May 21, 1875	76	48
Defendant's Exhibit No. 25—Letter from H. R. Clinn, Acting Commissioner, to H. F. Livingston, U. S. Indian Agent, dated May 24th	77	48
Defendant's Exhibit No. 26—Letter from H. R. Clinn, Acting Commissioner, to H. W. Bingham, U. S. Indian Agent, dated May 24	78	49
Defendant's Exhibit No. 27—Letter from H. R. Clinn, Acting Commissioner to John G. Gassman, U. S. Indian Agent, dated May 24	79	49
Defendant's Exhibit No. 28—Letter from R. E. Johnston, Captain 1st Infantry, Acting Indian Agent to Commissioner of Indian Affairs, dated November 6, 1876	80	49
Defendant's Exhibit No. 29—Letter from J. Q. Smith, Commissioner to the Secretary of the Interior, dated November 24, 1876	81	50
Defendant's Exhibit No. 30—Letter from Secretary of the Interior to the President, dated November 28, 1876	83	51
Defendant's Exhibit No. 31—Letter from Secretary of the Interior to the Commissioner of Indian Affairs, dated December 11, 1876	84	52
Defendant's Exhibit No. 32—Letter from J. Q. Smith, Commissioner, to Wm. F. Hughes, U. S. Indian Agent, dated December 13	85	52
Defendant's Exhibit No. 33—Letter from J. Q. Smith, Commissioner, to the Commissioner of the General Land Office, dated December 13	86	53

Record from Court of Claims—Continued
Portions of record material to errors assigned—Continued
Defendant's request for record—Continued Original Print
Defendant's Exhibit No. 34—Letter from E. J. Brooks, Acting Commissioner, to the Secretary of the Interior, dated June 6 ..... 88 53
Defendant's Exhibit No. 35—Letter from E. A. Hayt, Commissioner, to the Secretary of the Interior, dated June 27 ..... 91 55
Defendant's Exhibit No. 36—Letter from Secretary of the Interior to the Commissioner of Indian Affairs, dated August 11, 1879 ..... 93 56
Defendant's Exhibit No. 37—Letter from H. Price, Commissioner, to the Secretary of the Interior, dated March 14, 1884 ..... 94 57
Defendant's Exhibit No. 38—Letter from Angus Cameron to Secretary of the Interior, dated March 8, 1884 ..... 96 58
Defendant's Exhibit No. 39—Letter from Acting Secretary of the Interior to Commissioner of Indian Affairs, dated March 22, 1884 ..... 97 59
Clerk's certificate ..... (omitted in printing) .. 98

Order allowing certiorari 60

[fol. 1]

IN THE COURT OF CLAIMS OF THE UNITED STATES

No. C-531-(8)

Lands Added to 1868 Reservation

THE SIOUX TRIBE OF INDIANS, Consisting of the Sioux Tribe of the Rosebud Indian Reservation in the State of South Dakota; the Sioux Tribe of the Standing Rock Indian Reservation in the States of North Dakota and South Dakota; the Sioux Tribe of the Pine Ridge Indian Reservation in the State of South Dakota; the Sioux Tribe of the Cheyenne River Indian Reservation in the State of South Dakota; the Sioux Tribe of the Crow Creek Indian Reservation in the State of South Dakota; the Sioux Tribe of the Lower Brule Reservation in the State of South Dakota; the Sioux Tribe of the Santee Indian Reservation in the State of Nebraska; and the Sioux Tribe of the Fort Peck Indian Reservation in the State of Montana, *Plaintiffs*,

v.

UNITED STATES OF AMERICA, *Defendant*

[fol. 2] I. SEPARATED AMENDED PETITION

Original Petition Filed May 7, 1923

Separated Amended Petition Filed May 7, 1934

To the Honorable Chief Justice and Judges of the Court of Claims:

Now come the plaintiffs, the Sioux Tribe of Indians, consisting of the Sioux Tribe of the Rosebud Indian Reservation in the State of South Dakota; the Sioux Tribe of the Standing Rock Indian Reservation in the States of North Dakota and South Dakota; the Sioux Tribe of the Pine Ridge Indian Reservation in the State of South Dakota; the Sioux Tribe of the Cheyenne River Indian Reservation in the State of South Dakota; the Sioux Tribe of the Crow Creek Indian Reservation in the State of South Dakota; the Sioux Tribe of the Lower Brule Reservation in the State of South Dakota; the Sioux Tribe of the Santee Indian

Reservation in the State of Nebraska; and the Sioux Tribe of the Fort Peck Indian Reservation in the State of Montana; and for their Petition respectfully show:

I

That an Act of Congress, approved June 3, 1920 (41 Stat. 738), authorizes the Sioux Tribe of Indians, or any band thereof, to bring a suit or suits against the United States, the defendant herein, under any treaties, agreements or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due; and said act is in words and figures as follows, to wit:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States, which have [fol. 3] not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said tribe from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon.

"Sec. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums heretofore paid or expended for the benefit of said tribe or any band thereof. The claim or claims of the tribe or band or bands thereof may be presented separately or jointly by petition, subject,

however, to amendment, suit to be filed within five years after the passage of this Act; and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant, and any band or bands of said tribe or any other tribe or band of Indians the court [fol. 4] may deem necessary to a final determination of such suit or suits may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys employed by said Sioux Tribe or any bands thereof, shall set forth all the facts on which the claims for recovery are based, and said petition shall be signed by the attorney or attorneys employed and no other verification shall be necessary. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said tribe or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for the said tribe or bands of Indians.

"Sec. 3. That upon the final determination of such suit, cause, or action the Court of Claims shall decree such fees as it shall find reasonable to be paid the attorney or attorneys employed therein by said tribe or bands of Indians under contracts negotiated and approved as provided by existing law, and in no case shall the fee decreed by said Court of Claims be in excess of the amounts stipulated in the contracts approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and no attorney shall have a right to represent the said tribes or any band thereof in any suit, cause, or action under the provisions of this Act until his contract shall have been approved as herein provided. The fees decreed by the court to the attorney or attorneys of record shall be paid out of any sum or sums recovered in such suits or actions, and no part of [fol. 5] such fees shall be taken from any money in the Treasury of the United States belonging to such tribe or bands of Indians in whose behalf the suit is brought unless specifically authorized in the contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior as herein provided: *Provided*, That in no case shall the fees decreed by said court amount to more than 10 per centum of the amount of the judgment recovered in such cause."

II

That the defendant has and does recognize plaintiffs as the Sioux Tribe of Indians, and has and does recognize as bands of the Sioux Tribe of Indians the Indians of the Indian Reservations hereinbefore named.

III

That plaintiffs have entered into a contract with Ralph H. Case and C. C. Calhoun, attorneys-at-law of Washington, D. C., under date of September 11, 1922, whereby said attorneys are duly authorized to represent them, the plaintiffs, and to file this suit in their behalf, and that said contract has been duly approved by the Commissioner of Indian Affairs and the Secretary of the Interior on December 21, 1922.

That on July 13, 1932, said Ralph H. Case and C. C. Calhoun assigned an interest in the above mentioned contract to Kingman Brewster, J. S. Y. Ivins, and Rice Hooe, attorneys-at-law of Washington, D. C., and that said assignment has been duly approved by the Commissioner of Indian Affairs on July 20, 1932, and by the First Assistant Secretary of the Interior on July 21, 1932.

[fol. 6] IV

That article II of the treaty of April 29, 1868 (15 Stat. 635) provided as follows:

"The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri river where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing,

with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided."

[fol. 7]

V

That by Executive Orders dated January 11, 1875 (1 Kap. 898), March 16, 1875 (1 Kap. 884), May 20, 1875 (1 Kap. 898), and November 28, 1876 (1 Kap. 884), the President of the United States, pursuant to the aforesaid provisions of article II of the treaty of 1868, added to the permanent reservation and made a part thereof certain lands as in said Executive Orders described, and that by such acts the plaintiffs, who were then and theretofore occupants of said area, became possessed of a title of exactly the same extent and quality as the title of plaintiffs to the lands west of the Missouri River described in said article II of said treaty, that is to say, a title in fee.

VI

That thereafter on August 9, 1879 (1 Kap. 899) and March 20, 1884 (1 Kap. 884), Executive Orders were issued by the President of the United States restoring to the public domain certain of the lands heretofore described in paragraph V above, totaling in area 5,667,016.74 acres, and that from and after the dates of said Executive Orders, to wit: August 9, 1879, and March 20, 1884, plaintiffs have been excluded from and denied the use of all of said area. That the aforesaid Executive Orders of August 9, 1879, and March 20, 1884, *supra*, were in violation of the rights and a misappropriation of lands of the plaintiffs and that defendant by its military forces removed plaintiffs from the area so misappropriated by force and arms.

VII

That the land so misappropriated was reasonably worth [fol. 8] $1.25 per acre at the respective dates of the taking thereof, and that there is now due and owing to the plaintiffs as just compensation for the taking of such lands $7,083,770.93, together with interest thereon from and after the respective dates of misappropriation.

Wherefore, the premises considered, the plaintiffs pray:

That this petition be considered by the Court and judgment entered in favor of the plaintiffs for the sum of $7,083,770.93 with interest and the costs of this action.

For such other and further relief as to the Court may seem just and proper in the premises.

The Sioux Tribe of Indians,

Consisting of:

The Sioux Tribe of the Rosebud Indian Reservation in the State of South Dakota.

The Sioux Tribe of the Standing Rock Indian Reservation in the States of South Dakota and North Dakota.

The Sioux Tribe of the Pine Ridge Indian Reservation in the State of South Dakota.

The Sioux Tribe of the Cheyenne River Indian Reservation in the State of South Dakota.

The Sioux Tribe of the Crow Creek Indian Reservation in the State of South Dakota.

The Sioux Tribe of the Lower Brule Reservation in the State of South Dakota.

The Sioux Tribe of the Santee Indian Reservation in the State of Nebraska.

[fols. 9-10] The Sioux Tribe of the Fort Peck Indian Reservation in the State of Montana.

Ralph H. Case, Kingman Brewster, J. S. Y. Ivins, C. C. Calhoun, Rice Hooe, *Attorneys in Fact.*

Duly sworn to by Ralph H. Case. Jurat omitted in printing.

[fols. 11-12] II. General Traverse—Filed June 16, 1934

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimant herein, denies each and every allegation therein

contained; and asks judgment that the amended petition be dismissed.

Carl McFarland, Assistant Attorney General.

G.T.S.

III. Argument and Submission of Case

On October 9, 1940, argument of the case on merits was begun by Mr. Ralph H. Case for plaintiff, and by Mr. George T. Stormont for defendant.

On October 10, 1940, argument was concluded and case submitted on merits by Mr. George T. Stormont for defendant, and by Mr. J. S. Y. Ivins and Mr. Ralph H. Case for plaintiff.

[fol. 13] IV. **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Whaley, Chief Justice**—Filed April 7, 1941

Messrs. J. S. Y. Ivins and Ralph H. Case for the plaintiff. Mr. Richard B. Barker was on the briefs.

Mr. George T. Stormont, with whom was Mr. Assistant Attorney General Norman M. Littell, for the defendant. Mr. Raymond T. Nagle was on the briefs.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

Special Findings of Fact

1. Under authority of the act of June 3, 1920 (c. 222, 41 Stat. 738), the plaintiff, which constitutes the Sioux tribe named therein, through its duly authorized attorneys, filed its petition in this court on May 7, 1923, and on May 7, 1934, filed its separated and amended petition upon the alleged cause of action here involved.

2. By a treaty between the United States and various tribes and bands of the Sioux Nation concluded in the year 1868 and ratified by the Senate of the United States on February 16, 1869, a certain "district of country" was "set apart for the absolute and undisturbed use and occupation of the Indians herein named." Article II containing this stipulation is as follows:

The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the

[fol. 14] Missouri river where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided. (15 Stat. 635, 636.)

3. Under the article of the treaty above cited, the Great Sioux Reservation extended to low-water mark on the east bank of the Missouri River and included two small existing reservations on the east bank of the River, thus leaving open for settlement a large tract of country bordering on the east bank of the Missouri. The ready access to the Great Sioux Reservation thus afforded was taken advantage of by white men who infested the country for the purpose of carrying on the liquor traffic. In 1874 and 1875 this traffic had gained such proportions that the Commissioner of Indian Affairs deemed it necessary to take some positive steps to suppress it. Accordingly, on January 8, 1875, he recommended to the Secretary of the Interior that the President be requested to issue an order withdrawing from sale and setting apart

for Indian purposes a certain described tract of country, this action "being deemed necessary for the suppression of liquor traffic with the Indians upon the Missouri River," [fol. 15] and enclosed with his recommendation a draft of the requested order.

The Secretary concurred in the recommendation and on January 9, 1875, forwarded the Commissioner's recommendation to the President, together with the draft of the proposed order, and recommended that it be signed, "the same being deemed necessary for the suppression of the liquor traffic with the Indians upon the Missouri River."

The suggested order was signed by the President on January 11, 1875, and is as follows:

Executive Mansion,
January 11, 1875.

It is hereby ordered that the tract of country in the Territory of Dakota lying within the following described boundaries, viz: Commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same; thence east with said parallel of latitude to the ninety-ninth degree of west longitude; thence south with said degree of longitude to the east bank of the Missouri River; thence up and with the east bank of said river to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

U. S. Grant.

The Commissioner of Indian Affairs thereupon on January 14, 1875, transmitted copies of this order to the agents at the agencies along the Missouri River, advising them that the land described in the order had been withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation, "the same being deemed necessary for the suppression of the liquor traffic with the Indians upon the Missouri River."

Lying within the limits of the lands described in the Executive Order were the lands of the old Winnebago Reservation and the Crow Creek Reservation, which had been established pursuant to the provisions of the acts of February 21, 1863, and March 3, 1863. Exclusive of the acreage embraced in these two reservations, the lands included in

the Executive Order of January 11, 1875, measured approximately 5,151,130.48 acres.

4. On February 15, 1875, a number of settlers residing upon the lands embraced in this Executive Order presented [fol. 16] a petition to the President asking that the order be so modified as to permit them to remain upon their improvements until compensation had been made to them by the Government. The matter was referred to the Commissioner of Indian Affairs for action, who replied under date of March 23, 1875, in part, as follows:

In reply I would respectfully state, that the object of the order in question, is to enable the suppression of the liquor traffic with the Indians on the Missouri River.

This order does not affect existing rights of any persons, residents within the limits of the Territory withdrawn, nor is it supposed that the withdrawal will be made permanent, or that any purchases will be made by the Government of property owned by individuals, in the tract of country withdrawn. There will be no interference with the legitimate business pursuits of any persons lawfully residing within the said limits.

The communication from the President transmitting said petition is, herewith, respectfully returned.

In April 1875 certain citizens of Buffalo County, Dakota Territory, petitioned for damages in consequence of the Executive Order of January 11, 1875, having withdrawn from settlement the lands occupied by them and reserved them for the use of the Indians. By direction of the Secretary of the Interior, the petitioners were informed by the Commissioner of Indian Affairs that the Executive Order was not intended to interfere in any manner with their peaceful occupancy of the country but to prevent the introduction of whiskey into the reservation, and the agents were instructed to restrain the Indians from molesting the settlers on the lands covered by the Executive Order.

5. On March 13, 1875, the Commissioner of Indian Affairs recommended to the Secretary of the Interior that the President be requested to withdraw from sale and set apart for Indian purposes a further described tract, stating that the recommendation was made for the same reasons expressed in his recommendation of January 8, 1875. A draft

of the suggested order accompanied his recommendation. The Secretary concurred in the recommendation and forwarded the Commissioner's letter and draft of the order to the President, requesting that it be signed, "the same being deemed necessary for the suppression of the liquor [fol. 17] traffic with the Indians at the Standing Rock Agency." The order was signed by the President on March 16, 1875, and is as follows:

Executive Mansion,
March 16, 1875.

It is hereby ordered that the tract of country in the Territory of Dakota lying within the following-described boundaries, viz, commencing at a point where the one hundred and second degree of west longitude intersects the forty-sixth parallel of north latitude; thence north on said one hundred and second degree of longitude to the south bank of the Cannon Ball River; thence down and with the south bank of said river to a point on the east side of the Missouri River, opposite the mouth of said Cannon Ball River; thence down and with the east bank of the Missouri River to the mouth of Beaver River; thence up and with the south bank of Beaver River to the one hundredth degree of west longitude; thence south with said one hundredth degree of longitude to the forty-sixth parallel of latitude; thence west with said parallel of latitude to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

U. S. Grant.

Copies of this order were transmitted to the various agents on the Great Sioux Reservation by the Commissioner of Indian Affairs on March 19, 1875, with the statement that the addition to the Great Sioux Reservation was "deemed necessary for the suppression of the liquor traffic with the Indians at the Standing Rock Agency." A similar notification was sent to the Commissioner of the General Land Office.

The area described in this Executive Order measured approximately 784,893.32 acres.

6. On May 13, 1875, the Secretary of War transmitted to the Secretary of the Interior for his information a letter from the officer in command of the Southern District of the

Military Department of Dakota. In this letter the officer in question called attention to the fact that there was a small tract of land opposite the Sioux Reservation on the east side of the Missouri River, just north of the Fort Randall Military Reservation, which was not included in any reservation and which afforded "a very nice point for whiskey sellers and horse thieves," and stated that if this [fol. 18] tract could be embraced within some reservation the Missouri River from Choteau Creek to the forty-sixth parallel would be entirely free from the presence of whiskey sellers and the condition of the Indians would be better. The matter was referred to the Commissioner of Indian Affairs by the Secretary of the Interior for "consideration and recommendation," with the comment that the suggestions were deemed worthy of adoption.

On May 18, 1875, the Commissioner acknowledged the reference, recommended that an Executive Order be issued withdrawing the tract in question from sale and setting it apart for Indian purposes, and enclosed a draft of the proposed order. On May 19, 1875, in a letter to the President the Secretary of the Interior stated that he concurred in the enclosed recommendation of the Commissioner of Indian Affairs and requested that the draft of the order be signed. The order was signed by the President on May 20, 1875, and is as follows:

Executive Mansion,
May 20, 1875.

It is hereby ordered that that portion of the public domain in the Territory of Dakota lying south of an east and west line from the northwest corner of the Yankton Indian Reservation to the ninety-ninth degree of longitude, and between said longitude and the Missouri River on the west and the Yankton Indian Reservation on the east, be, and the same hereby is, withdrawn from sale and settlement and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

U. S. Grant.

Copies of the order were transmitted by the Commissioner of Indian Affairs to the agents at the Crow Creek, Cheyenne River, and Yankton agencies for their information.

The lands covered by this order measured approximately 111,648.31 acres.

7. By letter dated November 7, 1876, Captain R. E. Johnston of the 1st Infantry, Acting Indian Agent at the Standing Rock Agency, notified the Commissioner of Indian Affairs that numbers of white men were settled along the north bank of Beaver River in the vicinity of the agency; that these men made a business of selling liquor to the Indians and ammunition both to the Indians on the reserva- [fol. 19] tion and to the hostile Sioux, and that their presence was a source of constant trouble and annoyance, and recommended that the described tract be made an Executive addition to the reservation as soon as possible so that the illegal traffic carried on therein "may be stopped."

In a letter to the Secretary of the Interior, dated November 24, 1876, the Commissioner of Indian Affairs, concurring in Captain Johnston's recommendation, recommended that the President be requested to sign the enclosed draft of order withdrawing from sale and settlement and adding to the Sioux Reservation the lands therein described, "with a view to the suppression of this traffic" and stated:

The adoption of this order will effectually cut off these whiskey dealers, in their nefarious traffic, from all approach to the Missouri river, from the Yankton Agency to Bismarck. It is not proposed to interfere with the vested rights, or the legitimate business of any settler who may be upon this tract.

In a letter dated November 28, 1876, addressed to the President, the Secretary of the Interior enclosed the Commissioner's recommendation, with the statement that he approved of it and the reasons therefor, and requested that the President sign the enclosed draft of the necessary order.

The order was signed by the President on November 28, 1876, and is as follows:

Executive Mansion,
November 28, 1876.

It is hereby ordered that the tract of country in the Territory of Dakota on the east side of the Missouri River, lying within the following boundaries, viz: Commencing at a point on the south bank of Beaver River, intersected by the one hundredth degree of west longitude; thence in a direct

line to the east corner of the Fort Rice Military Reservation; thence in a southwestern direction along the said military reservation to the east bank of the Missouri River; thence with the east bank of the Missouri River to the mouth of Beaver River; thence up and with the south bank of Beaver River to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

U. S. Grant.

[fol. 20] The Commissioner of Indian Affairs was advised of the President's action on December 13, 1876, and on the same day addressed a letter to the agent at Standing Rock Agency, enclosing a copy of the Executive Order and stating that the lands had been added to the Sioux Reservation "with a view to the suppression of the liquor traffic upon the Missouri River between the aforesaid points," and that the addition "is not intended to interfere with the vested rights of any settler upon the tract or with the legitimate business pursuits of any person lawfully residing within its limits." On the same date the Commissioner notified the Commissioner of the General Land Office of the issuance of the order and stated that the boundaries of the reservation had been thus extended "with a view to the suspension of the liquor traffic upon the Missouri river from Beaver river to Fort Rice military reservation."

The lands covered by this order measured approximately 120,247.02 acres.

8. On June 6, 1879, in a letter to the Secretary of the Interior, the Commissioner of Indian Affairs, reporting upon a request for a modification of the eastern boundary of the Sioux Reservation as fixed by the Executive Orders of January 11 and May 20, 1875, so as to permit access to the Missouri River by the settlers who were rapidly locating in that part of the Territory of Dakota, stated the facts and circumstances leading to the issuance of the Executive Orders in question. He recited the fact that by the treaty of April 29, 1868, a large area of country on the east bank of the Missouri River was thrown open to settlement, thus affording ready access to the Indians upon the reservation, which circumstance was taken advantage of by white men who infested the country for the purpose of carrying on the

liquor traffic; that in 1874 and 1875 this traffic had gained such proportions that it was deemed necessary to take some positive steps to suppress it; that accordingly the Executive Orders of January 11 and May 20, 1875, were issued extending the eastern boundary of the reservation to the ninety-ninth degree of west longitude from the forty-eighth parallel (sic, should be "forty-sixth") of North latitude to the Missouri River and including a small tract of country [fol. 21] lying between the Yankton Reservation and the Missouri River; that these orders effectually cut off all unlawful communications with the Indians and to a great extent accomplished the object desired, that is, the prevention of the sale of liquor to the Indians; that to restore to the public domain all or any part of the lands bordering on the Missouri River and set apart by the Executive orders referred to would reopen and give renewed life to this unlawful traffic and be detrimental to the best interests of the Indians, and therefore declined to recommend any change in or modification of the reservation boundaries.

By letter dated June 27, 1879, the Commissioner of Indian Affairs advised the Secretary of the Interior that the matter of restoring the lands set apart as additions to the Sioux Reservation by the Executive orders of January 11, March 16 and May 20, 1875, and November 28, 1876, to the public domain had been given careful reconsideration and he had reached the conclusion that the lands involved, with certain exceptions, could be so restored and the interests of the Indians still be protected. The Commissioner recited that the lands had been set apart for the purpose of preventing illegal liquor traffic with the Indians and that at the date they were so set apart there was no law providing a punishment for the sale of liquor to the Indians "except to Indians in the Indian country," but that by reason of the act of February 27, 1877 (19 Stat. 244), "persons who now engage in liquor traffic with the Indians, no matter in what locality, are liable to a penalty of $300 and two years' imprisonment, and therefore the necessity for so large a reservation for the protection of these Indians in this respect does not now exist." The Commissioner further stated that the Indians "at the Crow Creek and Lower Brulé Agencies are protected by the Winnebago and Crow Creek Reservations established by treaties" and that the Indians at the Cheyenne, Grand River, and Standing Rock

Agencies could be sufficiently protected by excepting from the order restoring the lands to the public domain certain described small tracts on the east bank of the Missouri River opposite the respective agencies, and enclosed with [fol. 22] the letter a draft of the proposed order. The requested order was signed by the President on August 9, 1879, and is as follows:

Executive Mansion,
August 9, 1879.

It is hereby ordered that all that portion of the Sioux Indian Reservation in Dakota Territory created by Executive orders dated January 11, March 16, and May 20, 1875, and November 28, 1876, lying within the following-described boundaries, viz: Beginning at a point where the west line of the Fort Randall Military Reservation crosses the Missouri River; thence up and along said river to the mouth of American Creek; thence up and along said creek to the ninety-ninth degree of west longitude; thence south along said degree to a point due west from the northwest corner of the Yankton Indian Reservation; thence due east to the northwest corner of said reservation; thence due south to the north boundary line of Fort Randall Military Reservation; thence following said boundary line northwesterly to the northwest corner of said military reservation; thence south on the west boundary line of said reservation to the place of beginning. And also the following-described land: Beginning at the east bank of the Missouri River at the mouth of Medicine Knoll Creek; thence up and along the Missouri River to the boundary line of Fort Sully Military Reservation; thence northeasterly along said boundary line to the southeast corner of said military reservation; thence northwesterly along the boundary line of said reservation to the northeast corner thereof; thence due north to the east bank of the Missouri River; thence up and along the east bank of said river to the mouth of the Bois Cache; thence due north to the east bank of the Missouri River; thence up and along the east bank of said river to the south line of township 129 north; thence east along said township line to the line between ranges 78 and 79 west; thence north along said range line to Beaver Creek, or the north boundary line of the reservation set aside by the Executive order of March 6, 1875; thence west along said creek to the east bank of the Missouri River; thence up and along said east

bank to the southeast corner of Fort Rice Military Reservation; thence northeasterly along said military reservation to the east corner of said reservation; thence in a direct line to a point on the south bank of Beaver Creek where said creek is intersected by the one-hundredth degree of west longitude; thence south with said one-hundredth degree of longitude to the forty-sixth parallel of north latitude; thence east with said parallel of latitude to the ninety-[fol. 23] ninth degree of west longitude; thence south with said degree of longitude to its intersection with the north boundary line of the old Sioux or Crow Creek Reservation; thence west along the north boundary line of said reservation to the eastern boundary line of the old Winnebago Reservation; thence north along said east line to the northeast corner of said Winnebago Reservation; thence west along the north boundary line of said reservation to the middle channel of Medicine Knoll Creek; thence down the middle channel of said creek to the place of beginning, be, and the same hereby is, restored to the public domain.

R. B. Hayes.

The lands embraced within this order measured approximately 5,562,035.45 acres.

The Commissioner of the General Land Office was notified of the President's action by the Secretary of the Interior on August 11, 1879.

9. On March 8, 1884, Senator Angus Cameron in a letter to the Secretary of the Interior called his attention to the small tract of land opposite the mouth of the Grand River which had been excepted from the order of restoration to the public domain of August 9, 1879, stated that there was not and had not been for a long time a single Indian on the tract, that the Indians did not seem to know it had not been restored to the public domain, and that the settlers upon the land adjoining the tract were very desirous that it be thrown open to settlement, and requested that he inquire into the matter. The Senator's letter was referred to the Commissioner of Indian Affairs and, on March 14, 1884, the commissioner replied, stating that he had before him in addition to Senator Cameron's letter, two petitions "numerously signed by settlers praying for the restoration of the lands opposite Grand River and Cheyenne River agencies." The Commissioner reviewed the situation, stat-

ing that the Executive Orders of January 11, March 16, and May 20, 1875, and November 28, 1876, withdrawing from sale and settlement certain tracts of country east of the Missouri River and setting them apart as additions to the Great Sioux Reservation, had been made for the purpose of suppressing liquor traffic with the Indians on the reservation, and that by the subsequent Executive Order of August 9, 1879, all the territory so withdrawn, with the exception of [fol. 24] small tracts opposite the Standing Rock Agency, the Grand River Agency, and the Cheyenne River Agency had been restored to the public domain. These three tracts, he stated, had been retained as a means of protection to those agencies. He further stated that since the order of restoration of August 9, 1879, the Grand River Agency had been discontinued and that the agents at Standing Rock and Cheyenne River agencies had reported that these Executive additions were no longer required for the purpose for which they were originally intended and recommended that they be restored to the public domain. The Commissioner then stated that having fully considered the matter he recommended that the three remaining tracts be restored to the public domain, and enclosed a draft of an Executive Order which would accomplish this. The Commissioner's recommendation was concurred in by the Secretary of the Interior and submitted to the President on March 15, 1884. The President signed the order on March 20, 1884, and the commissioner was notified of this action on March 22, 1884. The order is as follows:

Executive Mansion,
March 20, 1884.

It is hereby ordered that the lands embraced within the three existing Executive additions to the Great Sioux Reservation, in Dakota, east of the Missouri River, viz, the one opposite the Standing Rock Agency, the one opposite the mouth of Grand River and the site of the old Grand River Agency, and the one opposite the mouth of Big Cheyenne River and the Cheyenne River Agency, be, and the same are hereby, restored to the mass of the public domain, the same being no longer needed for the purpose for which they were withdrawn from sale and settlement.

Chester A. Arthur.

The three tracts thus restored to the public domain measured approximately 104,981.29 acres.

10. The aforesaid Executive Orders of 1879 and 1884 were issued for the purpose of restoring to the public domain lands which were no longer needed for the purpose for which they had been withdrawn from sale by the Executive Orders of 1875 and 1876.

11. By the Indian Appropriation act for the year 1877 Congress declared that

> • • • hereafter there shall be no appropriation made [fol. 25] for the subsistence of said Indians [i. e., the Sioux], unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight for said Indians; and also so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude, and shall also grant right-of-way over said reservation to the country thus ceded for wagon or other roads, from convenient and accessible points on the Missouri River, • • •. (19 Stat. 176, 192.)

A commission to carry out this provision of law was promptly appointed, proceeded to the Sioux country, and submitted to the tribe the agreement prepared by it in conformity with the terms of the act, informing the tribe that the agreement had been prepared in accordance with the conditions required by the act and that it had no authority to vary these conditions in any particular. The agreement was thereupon signed by the Indians with a full understanding on their part of the conditions imposed by the act of August 15, 1876.

By Article 1 of this agreement with the Sioux Indians of September 26, 1876, ratified by the Congress on February 28, 1877 (19 Stat. 254, 255), it was provided:

> The said parties hereby agree that the northern and western boundaries of the reservation defined by article 2 of the treaty between the United States and different tribes of Sioux Indians, concluded April 29, 1868, and proclaimed February 24, 1869, shall be as follows: The western boundaries shall commence at the intersection of the one hundred and third meridian of longitude with the northern boundary of the State of Nebraska; thence

north along said meridian to its intersection with the South Fork of the Cheyenne River; thence down said stream to its junction with the North Fork; thence up the North Fork of said Cheyenne River to the said one hundred and third meridian; thence north along said meridian to the South Branch of Cannon Ball River or Cedar Creek; and the northern boundary of their said reservation shall follow the said South Branch to its intersection with the main Cannon Ball River, and thence down the said main Cannon Ball River to the Missouri River; and the said Indians do hereby relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described, including all privileges of hunting; and article 16 of said treaty is hereby abrogated.

[fol. 26] CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and its petition is therefore dismissed.

OPINION

Whaley, *Chief Justice*, delivered the opinion of the court:

This case is one of several brought by the Sioux Nation and involves a large tract of land in the Northwest. It is agreed that it should be tried under Rule 39A which limits the hearing to the issues of fact and law relating to the right of the plaintiff to recover. The question of the extent of the recovery and the amount of set-offs are reserved for future proceedings.

In 1868 a treaty was made with the Sioux Nation which was ratified by the Senate in 1869, 15 Stat. 635, 636, whereby a certain definite tract of country was set apart for the absolute and undisturbed use and occupation of these Indians. The tract of country, so set apart, was described in Article II of the treaty, as follows:

Article II. The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite

where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the government as may be authorized [fol. 27] to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.

This treaty gave the Sioux Nation a permanent reservation to the lands described thereunder. The Indian Nation possessed the use and occupancy of this reservation and, as has been repeatedly held, this was equivalent to an Indian title and therefor- was in the nature of a cession by the United States of this territory to the Indian Nation. It is unquestioned that the United States retained the fee simple in all Indian lands. *Johnson* v. *McIntosh*, 8 Wheat. 543; *Beecher* v. *Wertherby*, 95 U. S. 517.

After this permanent reservation had been made to the Sioux Nation, with the exception of two small reservations on the east bank of the Missouri River, the whole territory on the east bank became public property subject to settlement and sale.

In 1874 the Commissioner of Indian Affairs reported to the Secretary of the Interior that the liquor traffic on the Missouri River was being taken advantage of by white men

because of the ready access to the great Sioux Reservation and it was necessary to take steps to suppress it. He recommended to the Secretary of the Interior that the President be requested to issue an order withdrawing from sale and setting apart for Indian purposes a certain tract of land adjoining this Indian Reservation on the east so as to suppress the liquor traffic with the Indians upon the Missouri River. The Secretary of the Interior, agreeing with the Commissioner of Indian Affairs, recommended to the President the withdrawing of this land on the east of the permanent reservation from settlement and sale so as to protect the Indians against this injurious traffic. On January 11, 1875, the President signed an Executive Order withdrawing from settlement and sale certain lands on the east bank of [fol. 28] the Missouri River described in the order. The order stated in part, after a description of the portion withdrawn:

> • • • the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

On February 15, 1875, certain residents of the lands embraced in the above Executive Order complained about molestations by the Indians on the settlers on the lands covered by the Executive Order. As a result, on March 13, 1875, the Commissioner of Indian Affairs recommended to the Secretary of the Interior a further withdrawal from settlement and sale of certain lands, which had not been included in the previous withdrawal order, so as to suppress the liquor traffic with the Indians at the Standing Rock Agency. As a result of this recommendation of the Secretary of the Interior, the President signed on March 16, 1875, a withdrawal order describing by metes and bounds certain lands to be set apart for the use of the several tribes of the Sioux Indians as an addition to their present reservation and territory.

Following this addition to the territory set aside for the reservation of the Sioux Indians, two other tracts of land were added to the reservation of the Sioux Indians by Executive Orders of May 20, 1875, and November 28, 1876, both of these Executive Orders being based on the suggestion of the Commissioner of Indian Affairs and the recommendation of the Secretary of the Interior to suppress the liquor traffic with the Indians on the treaty reservation.

In these four Executive Orders there is the expression "use" of the several tribes and not the words "use and occupation" or "use or occupation" as expressed in the treaty. It is true that the words "as an addition to their present reservation in said Territory" are used.

These four Executive Orders took from settlement and sale 5,151,130.48 acres under Executive Order of January 11, 1875; 784,893.32 acres under Executive Order of March 16, 1875; 111,648.31 acres under Executive Order of May 20, 1875; and 120,247.02 acres under Executive Order of November 28, 1876, respectively, or a total of 6,167,919.13 acres.

In 1879, the Secretary of the Interior, who had been advised by the Commissioner of Indian Affairs, recommended [fol. 29] that the lands, with certain exceptions, so withdrawn from settlement and sale under the four orders above mentioned, could be restored to the public domain and the liquor traffic with the Indians suppressed, under the act of February 27, 1879 ,19 Stat. 244). As a result of this recommendation of the Secretary of the Interior on August 9, 1879, the President signed an order restoring a part of these lands to the public domain. The lands embraced in this order contained approximately 5,562,035.45 acres.

Upon the recommendation of the Secretary of the Interior an Executive Order was signed on March 20, 1884, restoring lands embraced within the four Executive Orders of 1875 and 1876 not included in the previous order of restoration of 1879, the lands consisting of one tract opposite the Standing Rock Agency, a tract opposite the mouth of the Grand River and a tract opposite the mouth of the Big Cheyenne River Agency. The tracts so restored to the public domain measured approximately 104,981.29 acres.

On June 3, 1920, Congress passed a special jurisdictional act (41 Stat. 738) giving the Sioux Tribe of Indians the right to sue in this court on all claims arising under any treaties, agreements, or laws of Congress, or for the misappropriation of any funds or lands of said tribe and the court the right to hear and determine all legal and equitable claims of the said tribe against the United States.

It is contended by the plaintiff that the four Executive Orders of 1875 and 1876, in which these large tracts of lands were added to the Sioux permanent reservation gave to the Sioux Nation the same title to these additional tracts as they had in the permanent reservation which was made by the

treaty with the Sioux Nation. In other words, that the expression in the Executive Orders "use" of said tribe was equivalent to "use and occupation" or "use or occupation" and constituted an Indian title to the lands and that, when the lands were taken away by the orders of 1879 and 1884, there was such a fee in the Indians, as has been recognized by the Congress and the courts, as constituted an Indian title for which compensation should be given.

We do not think it is necessary or useful for a decision in this case to recite the many acts of the Executive dealing [fol. 30] with the public lands and withdrawing them from settlement and sale and setting apart certain portions as a reservation for the wandering bands of Indians. A full history of these Executive Orders is set out in the case of the *United States* v. *Midwest Oil Company*, 236 U. S. 459.

The title to the land involved in this case was originally in the United States, and the sole question before us is whether an irrevocable conveyance was made to the Indians which divested the Government of its interest in whole or in part. It is unnecessary to go into a discussion of the question of Indian country and Indian title because it has been well settled that Indian country means not only the lands reserved for the Indian reservations but lands over which the Indians roved. Indian title simply means that where the land has been reserved by treaty, act of Congress, or Executive Order, subsequently ratified by the Congress, the Indians take such a title to the land that when the land is taken away from them they are entitled to compensation. The actual fee is always in the United States but the use of the terms "use and occupation", "use or occupation", or "occupation" carry such an equitable title in the Indians that the Congress of the United States has always recognized that compensation should be given the Indians for the lands when they are taken. *Spalding* v. *Chandler*, 160 U. S. 394; *Seneca Nation* v. *Christy*, 162 U. S. 283, 288, 289.

It has always required Congressional action for the payment to the Indians for lands so taken, either by direct action of Congress or by submission of the claim to the courts for adjudication. *Frost* v. *Wenie*, 157 U. S. 46, 50; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 388; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *United States* v. *Blendaur*, 128 Fed. 910, 913; *Ash Sheep Co.* v. *United States*, 252 U. S. 159.

There are three kinds of Indian reservations: those which were created by treaties previous to 1871; those which have been created by acts of Congress since 1871; and those made by Executive Orders whereby the President has set apart public lands for the use of the Indians in order to keep them within a certain territory. By the act of June 30, 1919, the President was expressly prohibited from issuing Executive Orders creating reservations out of the public lands. (41 Stat. 3, 34.)

[fol. 31] In reference to Executive Order reservations, there was no law under which the President acted, but it has been recognized that the President issued these Executive Orders setting aside these public lands for public use under the right of the Executive to carry out the policy of preserving the public interest. The fee of any interest in these lands was never in the Executive.

The Constitution of the United States under Article 4, Sec. 3, provides that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. • • •"

This power to dispose of lands belonging to the United States is broadly conferred upon the Congress and it is only by legislation that the lands of the United States can be disposed of. In order to dispose of the public lands it is necessary for the Congress to take some action either by direct legislation or by conferring upon the President the power of the Congress so that he, acting as the agent of the Congress, can dispose of the lands. *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 168; *Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496, 504.

In the *Wisconsin Railroad Company* case, *supra*, the court said:

• • • The Constitution vests in Congress the power to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise. *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, 168.

In the case of *Gibson* v. *Choteau*, 13 Wall. 92, 99, the court said:

With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made.

[fol. 32] In the case of *United States* v. *Midwest Oil Company, supra*, it was held that the President had the right to withdraw public lands from settlement and sale, due to the fact that Congress had acquiesced in and given implied sanction of such a course of action from an early period in the history of the country and has never repudiated the exercise of such power. However, the court did not intend to mean that the power of withdrawal from settlement and sale gave to the President the right of alienation of the public property. It was for the protection of the public interest that these withdrawal orders were made and not for the purpose of disposing of the public lands. The President had no right to dispose of public lands under the Constitution. In that case the court further held at page 474:

For it must be borne in mind that Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein. Congress "may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale." *Camfield* v. *United States*, 167 U. S. 524; *Light* v. *United States*, 220 U. S. 536. Like any other owner it may provide when, how, and to whom its land can be sold. It can permit it to be withdrawn from sale. Like any other owner, it can waive its strict rights, as it did when the valuable privilege of grazing cattle on this public land was held to be based upon an "implied license growing out of the custom of nearly a hundred years." *Buford* v. *Houtz*, 133 U. S. 326. So too, in the early days the Government, by its silent acquiescence, assented to the general occupation of the public lands for mining." *Atchison* v. *Peterson*, 20 Wall. 512. If private persons could acquire a privilege in public land by virtue of an implied congressional consent, then for a much stronger reason, an implied

grant of power to preserve the public interest would arise out of like congressional acquiescence.

It will be seen that in all these cases it was a question of withdrawal by the President of public lands from settlement and sale or the right to mineral and oil rights of public lands but in no instance can we find a statement of what interest, if any, was given to Indian Tribes in lands set apart by Executive Orders for their use where such Indian Tribes had a permanent treaty reservation. In some of the Execu- [fol. 33] tive Orders adding lands out of the public domain to Indian territory there was the express provision that they were for temporary use. (Executive Orders, October 10, 1910, and March 22, 1911.)

In the case before us, although the Executive Orders did not contain words of a temporary nature, nevertheless, the recommendation of the Commissioner of Indian Affairs to the Secretary of the Interior, on which these Executive Orders were based, showed that the additions were solely for the purpose of regulating the liquor traffic on the Missouri River and the protection of these Indians on their permanent reservation from the injurious and harmful effects of such traffic. The use of the words in the treaty "or in such territory as may be added to this reservation for the use of said Indians" clearly intended such lands which may be added thereto, either by treaty, which was the sole way by which Congress dealt with these Indian Tribes up to 1871, or by act of Congress after 1871. Congress did not intend by these words to vest in the President the fee to the public domain, or the power to dispose of the title to it, a power which was, under the Constitution, in the Congress alone. It would have required some act of Congress by prior legislation, or subsequent ratification of the Executive Orders, in order to divest the United States of its title to the land and place it elsewhere. The President was simply an agent of the Congress. Under Article II § 3, of the Constitution, authority of the President is defined as follows:

He (the President) shall take care that the laws be faithfully executed.

But this section does not give the President the right to dispose of the public lands which the Constitution has committed to Congress and shows the lack of authority in the

President to convey any interests in public domain which have not been authorized by the Congress by previous or subsequent legislation. It is the President's duty to see that the laws are faithfully executed and in this discharge of [fol. 34] his duties the public lands can be withdrawn when it is in the interest of the public.

There was never any previous authority given to the President, before these four Executive Orders were signed, to dispose of the interest of the Government in these lands nor has there been any subsequent ratification of the two withdrawal orders of 1879 and 1884 to the present date.

The Sioux Nation did not get by these four Executive Orders, adding land to their permanent reservation, any interest for which the Government is responsible either in law or in equity. The additions were of a temporary nature to serve a public interest, and, when that public interest had been served, the withdrawal orders of 1879 and 1884 were issued returning the land to the public right of settlement and sale.

The plaintiff seems to rely chiefly on the opinion of Attorney General Stone rendered in 1924 to the President and the Secretary of the Interior. (34 Op. Atty. Gen. 181). The question before the Attorney General was whether the General Leasing Act of February 25, 1920, 41 Stat. 437, applied to Executive Order Indian reservations and he held that, where public lands had been set aside by Executive Order as an Indian reservation, the Leasing Act did not apply. It is true that in this opinion the question of Executive Order reservations was discussed but it was simply to show that in treaty reservations, Congressional reservations, and Executive Order reservations, where the Indians were on the lands occupying and using them, these lands could not be leased for oil and mineral deposits. It must be borne in mind, that, when the President ordered the four additions to the Sioux reservation, the orders contained the word "use" and not "use and occupation" or "use or occupation." It has been repeatedly held, and there is no need of citing authorities it is so well established, that when the words "use and occupation" or "use or occupation" are used in setting aside Indian reservations, although the fee remains in the Government nevertheless the Indians take such an equitable interest in the lands that when the lands are taken either by Congressional action or by withdrawal by the President,

compensation has been paid to the Indians. This is not true, however, where these words have not been used and in many instances where there have been withdrawals of [fol. 35] lands from Indian reservations, which have been made by Executive Order, no compensation has been paid.

Attorney General Stone in his opinion uses the following language:

> When, by an executive order, public lands are set aside, either as a new Indian reservation or an addition to an old one without further language indicating that the action is a mere temporary expedient, such lands are thereafter properly known and designated as an "Indian reservation;" *and so long, at least, as the order continues in force, the Indians have the right of occupancy and use and the United States has the title in fee. Spalding v. Chandler,* 160 U. S. 394; *In re Wilson,* 140 U. S. 575. [Italics ours.]

It will be seen that the Attorney General specifically states "so long, at least, as the order continues in force".

In the instant case the Executive Orders of 1875 and 1876 were withdrawn in 1879 and 1884. For over sixty years the Sioux Indians have not had the use of these lands and even during the periods from 1875 to 1879 and 1884 they had only the use which permitted hunting of buffalo and other game.

The opinion of the Attorney General must not be taken too broadly. The opinion was dealing with the General Leasing Law and its application to public lands and was rendered before the act of May 29, 1924 (43 Stat. 244) was passed. That act provided that unallotted lands on Indian Reservations, other than the Five Civilized Tribes and the Osage Reservation, were subject to leasing for mining purposes with the consent of the Council for the Indians, and the money received from the leasing of these lands belonged to the Indians but the State should have the right to tax the lands in which the leases were situate and the Secretary of the Interior was to pay the tax so assessed. It will be seen that this law provided for the unallotted lands on the Indian reservations. This clearly indicated permanent reservations made by treaty or act of Congress and not temporary reservations or additions to reservations made by the President under Executive Orders. This shows the intent of Congress to recognize one class and not to recognize the other.

[fol. 36] In *Lone Wolf* v. *Hitchcock, supra,* the Supreme Court held that the plenary power of Congress over tribal Indian property is such that the provisions in the existing treaty with the Indians could be abrogated without their consent. It was largely a question of policy for Congress to determine what interest the Indians would have in the lands.

This court has nothing to do with the moral question; that is a matter of policy and grace for the Congress. We must take into consideration all the relevant facts and circumstances surrounding the creation of the additions to the reservation in determining the character and extent of the Indian interests.

Taking all these matters into consideration, it seems clear that in issuing the Executive Orders of 1875 and 1876, which added some six million and odd acres to the Sioux treaty reservation, it was intended as a temporary expedient in order to protect the Indians from the injurious and nefarious liquor traffic, and the orders were temporary in their nature and could be withdrawn at any time and were withdrawn in 1879 and 1884.

The Sioux Indians took no interest which would entitle them to either legal or equitable relief. The petition is dismissed. It is so ordered.

Whitaker, *Judge;* Green, *Judge;* and Littleton, *Judge,* concur.

[fols. 37-38] V. JUDGMENT OF THE COURT—April 7, 1941

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover.

It is therefore adjudged and ordered that the plaintiff's petition be and the same is hereby dismissed.

[fols. 39-40] VI. PROCEEDINGS AFTER JUDGMENT

On June 5, 1941, the plaintiff a motion for an extension of time to file a motion for a new trial, which was allowed by the court on June 7, 1941.

On July 3, 1941, the plaintiff filed a motion for a new trial.

On October 6, 1941, the court entered the following Order on said motion:

Order

It Is Ordered this sixth day of October, 1941, that said motion be and the same is overruled.

By the Court.

Richard S. Whaley, Chief Justice.

On November 14, 1941, plaintiff filed a request for record in re certiorari under Rule 99 (a) and 99 (b).

[fol. 41] Order Settling the Record—November 28, 1941

The plaintiff having filed a petition for writ of certiorari to the Supreme Court in the above-entitled case, and both plaintiff and defendant having requested that certain portions of the evidence which are attached hereto be included in the record to be certified to the Supreme Court, and the court having found that both portions are accurate transcripts of the original record material to the errors assigned, the same are hereby this 28th day of November, 1941, approved as the record to be certified to the Supreme Court.

By the Court.

Richard S. Whaley, Chief Justice.

[fol. 42] **Portions of Record Material to Errors Assigned**

[fol. 43] [Title omitted]

Plaintiff's Request for Record in re Certiorari—Filed November 14, 1941

Comes now the plaintiff, by its attorney, and requests that the Clerk of this Court prepare and furnish the undersigned a certified transcript of the portions of the record in this case which are set out in the paper attached hereto, all of which, in his judgment, are material to the errors assigned in plaintiff's petition for writ of certiorari in this case.

Ralph H. Case, Attorney for Plaintiff, Southern Building, Washington, D. C.

[fol. 44] The following are the portions of the record requested by plaintiff to be certified as part of the transcript

on petition for certiorari in case C-531-(8), Sioux Tribe of Indians v. United States:

"Several of the commissioners are in favor of extending the country, from which the whites will be excluded (cf. Article 2 of 1868 Treaty) so as to include the Yankton Reservation and the James River country now occupied by the Yanktonais. We shall do this if we can, and if we can not, it is not probable that any commission can; and hence it is better for the Yanktonais and all Indians east of the river to trust to us." (Talks and councils held with the Indians, 1866-1869, R. p. 35.)

1873

Grand River Agency: Edmond Palmer, Agent

"As the Indians have abandoned their old farms, and moved to this place, with the exception of a portion of the Lower Yanctonai, who are encamped on the other side of the river, opposite the agency * * * On the 12th ultimo, as the Indians were ferrying their beef across the Missouri River, just above the old agency, the boat, by some accident, was overturned, and Mr. J. H. Hardie, the agency farmer, and two Indians, were drowned. It was impossible to render them any assistance, as there was no other boat at the place. The steamer 'May Lowery' passing soon after the accident, I found it necessary to engage her services in ferrying the Indians and their beef across the river." Rept. Comr. Ind. Aff. 1873, p. 231. (R. p. 270.)

1873

Cheyenne River Agency: H. W. Bingham, Agent

"The morals of the Indians of this agency are very good. They are industrious and temperate; during the fourteen months that I have been here, I have not seen or heard of an Indian under the influence of liquor." Rept. Comr. Ind. Aff. 1873, p. 232. (R. p. 270.)

[fol. 45] 1874

Cheyenne River Agency: H. W. Bingham, Agent

"I am happy to say that intemperance is comparatively unknown at this agency, and the introduction of spirituous

liquors discountenanced by myself and employes. I am beginning, however, to feel anxious in this matter, from the fact that a whisky-ranch has been established about six miles above us on the opposite side of the river, and a license for traffic in liquor granted by the Internal Revenue Department. Had I the authority which I supposed up to a late date was vested in me, I should most certainly take immediate steps to remove such a dangerous establishment, for although the Indians show no inclination to drink, still they dread the temptation to which a close proximity of liquor exposes them and so expressed themselves to me on several occasions." Rept. Comr. Ind. Aff. 1874, p. 240. (R. p. 271.)

1875

Standing Rock Agency: John Burke, Agent

"I found but one ferry-boat at the agency belonging to the Government, which, together with a yawl-boat, was kept in constant use, and proved entirely inadequate to the requirements of the service, so I had constructed by the agency employes another and more substantial ferry-boat, and now feel no inconvenience nor delay in the dispatch of agency business requiring attention on the east side of the Missouri River." Rept. Comr. Ind. Aff. 1875, p. 244. (R. p. 271.)

1876

Standing Rock Agency: John Burke, Agent

"The Indians belonging to this agency are four bands of the Sioux tribe—Upper and Lower Yanctonais, Uncpapas, and Blackfeet. Their reservation is a parallelogram formed by the forty-fifth and forty-sixth parallel [fol. 46] of north latitude, and by the ninety-ninth and one hundred and fourth meridian of west longitude, to which is added a tract of country north of the forty-sixth parallel bounded on the east and north by the one hundredth meridian and Beaver River, and on the west and north by the one hundred and second meridian and the Cannon Ball River. * * * The Lower Yanctonais have sixteen of their little farming settlements on the east side of the Missouri River." Rept. Comr. Ind. Aff. 1876, pp. 38-39. (R. p. 272.)

1878

Cheyenne River Agency: Theo. Schwan, Acting Agent

"The great majority live in five villages on the west side of the Missouri River, three of which are above and two below the agency; only about one-seventh of the entire number, the most progressive, are settled at Peoria Bottom, on the east side, 15 miles below Fort Sully. * * *

"It is generally believed that these Indians would do better if they and their agency were transferred to the east side of the Missouri River, where a part of their number are already located. While for grazing purposes there is probably but little difference in the relative value of the land on the two sides of the river, for agriculture the section on the east side of and bordering the river is in every respect preferable to that on this (the west) side. The soil is more fertile; there is less alkaline matter in it. The area of tillable land is much greater, and generally the shelter afforded on the eastern side is more extensive and easy of access than that of the bluffs opposite." Rept. Comr. Ind. Aff. 1878, pp. 20-22. (R. p. 272.)

[fol. 47] [Title omitted]

DEFENDANT'S REQUEST FOR RECORD—Nov. 22, 1941

Now comes the defendant in compliance with Rule 99(b) of this Court and files herewith an original and five copies of the parts of the evidence (other than that of which the Court takes judicial notice) which the defendant considers should become a part of the record to be certified to the Supreme Court and requests that such evidence be certified as a part of the transcript requested by plaintiff for the purpose of filing a petition for a writ of certiorari.

The parts of the evidence herewith presented and requested to be certified consist of the report of the Secretary of the Interior filed herein October 4, 1939, and enclosures here marked as exhibits 2 to 39, inclusive.

Norman M. Littell, Assistant Attorney General.

Raymond T. Nagle. George T. Stormont, Attorneys.

November, 1941.

[fol. 48] UNITED STATES DEPARTMENT OF THE INTERIOR

Office of the Secretary, Washington

August 9, 1939.

The Honorable The Attorney General.

In re Sioux Nation v. United States. Lands added to reservation.

MY DEAR MR. ATTORNEY GENERAL:

Reference is made to the call of Mr. George T. Stormont of your Department, of June 15, in which a request was made for copies of certain papers pertaining to section 3, paragraph 6, of the original petition No. C-531 upon which a report was made to your Department on May 19, 1932. These papers were desired in connection with the preparation of the answer of your Department in case No. C-531-8.

The old papers relating to Indian Affairs have been removed from this Department to the National Archives and are now in the custody of that government facility. A careful search was made, however, by the Archives for papers bearing upon this matter and copies thereof were made and transmitted to this Department. The enclosures herewith consist of a certified and an uncertified copy of each of the following papers:

Letter from	to	Date of letter
Commissioner of Indian Affairs	H. W. Bingham	Dec. 19, 1874
" " "	Sec. of Interior	Jan. 8, 1875
Act. Sec. of Interior	President	Jan. 9, 187–(yr. not
" " "	Comm. of Ind. Aff.	Jan. 12, 1875 (stated)
Comm. of Ind. Aff.	H. F. Livingston	Jan. 14, 1875
" " "	Edmond Palmer	Jan. 14, 1875
" " "	H. W. Bingham	Jan. 14, 1875
" " "	Sec. of Interior	March 13, 1875
Sec. of Interior	President	March 15, 1875
" "	Comm. of Ind. Aff.	March 16, 1875
Comm. of Ind. Aff.	E. A. Howard	March 19, 1875
" " "	H. F. Livingston	March 19, 1875
" " "	Comm. of Gen. Ld. Off.	March 19, 1875
" " "	J. J. Saville	March 19, 1875
" " "	H. W. Bingham	March 19, 1875
" " "	Edmond Palmer	March 19, 1875
John L. Pennington, Gov. Dakota Territ.	Comm. of Ind. Aff.	April 29, 1875
Sec. of Interior	Comm. " "	May 4, 1875
Comm. of Ind. Aff.	H. F. Livingston	May 8, 1875
" " "	H. W. Bingham	May 8, 1875

[fol. 49]

Letter from	to	Date of letter
Secretary of War	Sec. of Interior	May 13, 1875
Comm. of Ind. Aff.	Sec. " "	May 18, 1875
Act. Sec. of Interior	President	May 19, 1875
Act. Sec. of Interior	Comm. of Ind. Aff.	May 21, 1875
Act. Comm. of Ind. Aff.	H. F. Livingston	May 24, 1875
" " " " "	H. W. Bingham	May 24, 1875
" " " " "	John G. Cassman	May 24, 1875
Act. Ind. Agt., Stand. Rock	Comm. of Ind. Aff.	Nov. 7, 1876
Comm. of Ind. Aff.	Sec. of Interior	Nov. 24, 1876
Sec. of Interior	President	Nov. 28, 1876
" " "	Comm. of Ind. Aff.	Dec. 11, 1876
Comm. of Ind. Aff.	Wm. T. Hughes	Dec. 13, 1876
" " " "	Comm., Gen. Ld. Off.	Dec. 13, 1876
Act. Comm. of Ind. Aff.	Sec. of Interior	June 6, 1879
Comm. of Indian Aff.	Sec. " "	June 27, 1879
Sec. of Interior	Comm. of Ind. Aff.	Aug. 11, 1879
Comm. of Ind. Aff.	Sec. of Interior	Mar. 14, 1884
Angus Cameron	" " "	Mar. 8, 1884
Act. Sec. of Interior	Comm. of Ind. Aff.	March 22, 1884

There is no information contained in the current files of this Office which we may have been able to locate bearing upon the question involved. The reports of the Commissioners of Indian Affairs from 1871 to 1889 have been examined but there has been little found therein which bears directly upon the question, and such as has been found therein appears to be more thoroughly discussed in the enclosures herewith.

Sincerely yours, Oscar L. Chapman, Assistant Secretary.

Enclosure 2200505

[fol. 50] DEFENDANT'S EXHIBIT No. 2

II January 8th, —5.

SIR:

I have the honor to recommend that the President be requested to issue an order, withdrawing from sale and setting apart, for Indian purposes, a tract of country, in the Territory of Dakota, lying within the following described boundaries, viz: commencing on the east bank of the Missouri river where the forty-sixth parallel of north latitude crosses the same, thence east with said parallel of latitude to the ninety-ninth degree of west longitude, thence south with said degree of longitude to the east bank of the Missouri river, thence up, and with, the east bank of said river to the place of beginning, the same being deemed

necessary for the suppression of the liquor traffic with the Indians upon the Missouri river.

Very respectfully, Your obt. servant, Edw. P. Smith, Commissioner.

Hon. Secretary of the Interior.

[fol. 51] DEFENDANT'S EXHIBIT No. 3

Department of the Interior

Washington, D. C., Jan'y 9th, 187—.

SIR:

I have the honor to present, herewith, for the signature of the President, a draft of an Executive Order to withdraw from sale and set apart for Indian purposes the land therein described in the Territory of Dakota, as recommended by the Commissioner of Indian Affairs, the same being deemed necessary for the suppression of the liquor traffic with the Indians upon the Missouri river.

The report of the Commissioner of the 8th instant, upon the subject, is herewith submitted.

Very respectfully, Your obedient servant, B. R. Bowen, Acting Secretary.

The President.

[fol. 52] DEFENDANT'S EXHIBIT No. 4

Department of the Interior

Washington, D. C., Jan'y 12th, 1875.

SIR:

I return, herewith, signed by the President, the draft of Executive Order setting apart certain lands, in Dakota Territory, therein described, as an addition to the Sioux reservation in said Territory which accompanied your letter of the 8th instant addressed to this Department.

Very respectfully, Your obt. servant, B. R. Bowen, Acting Secretary.

The Commissioner of Indian Affairs.

[fol. 53] DEFENDANT'S EXHIBIT No. 5

II. January 14th, ——5.

SIR:

I enclose herewith, for your information, a copy of an Executive Order dated January 11, 1875, withdrawing from sale and setting apart certain lands therein described in the Territory of Dakota, on the east side of the Missouri river, for the use of the several tribes of Sioux Indians as an addition to their present reservation, the same being deemed necessary for the suppression of the liquor traffic with the Indians upon the Missouri river.

Very respectfully, Your obt. servant, Edw. P. Smith, Commissioner.

H. F. Livingston, Esq., U. S. Indian Agent, Crow Creek Agency, Dakota Territory.

[fol. 54] DEFENDANT'S EXHIBIT No. 6

II. January 14th, ——5.

SIR?

I enclose herewith, for your information, a copy of an Executive Order, dated January 11, 1875, withdrawing from sale and setting apart certain lands therein described—in the Territory of Dakota, on the east side of the Missouri river, for the use of the several tribes of Sioux Indians as an addition to their present reservation, the same being deemed necessary for the suppression of the liquor traffic with the Indians upon the Missouri river.

Very respectfully, Your obt. servant, Edw. P. Smith, Commissioner.

Edmond Palmer, Esq., U. S. Indian Agent, Standing Rock Agency, Dakota Territory.

[fol. 55] DEFENDANT'S EXHIBIT No. 7

January 14th, —5.

SIR:

I enclose herewith, for your information, a copy of an Executive Order, dated January 11, 1875, withdrawing from sale and setting apart certain lands—therein described—

in the Territory of Dakota, on the east side of the Missouri river, for the use of the several tribes of Sioux Indians as an addition to their present reservation, the same being assured necessary for the suppression of the liquor traffic with the Indians upon the Missouri river.

Very respectfully, Your obt. servant, Edw. P. Smith, Commissioner.

H. W. Bingham, Esq., U. S. Indian Agent, Cheyenne River Agency, Dakota Territory.

[fol. 56] DEFENDANT'S EXHIBIT No. 8

Mch. 13th, —5.

SIR:

Referring to office report of the 8th of Jan. last, recommending the extension of the Sioux Indian reservation in Dakota, on the east side of the Missouri river, I have now to respectfully request for similar reasons; viz:—the suppression of the liquor traffic with the Indians at the Standing Rock Agency, that the President be requested to issue an order, withdrawing from sale and setting apart for Indian purposes, a tract of country in the Territory of Dakota, lying within the following described boundaries: Beginning at a point where the 102d degree of West Longitude intersects the 46th parallel of north latitude, thence north on said 102d degree of longitude, to the south bank of Cannon Ball river, thence down and with, the south bank of said river to a point on the east bank of the Missouri river, opposite the mouth of said Cannon Ball river; thence down and with, the east bank of the Missouri river to the mouth of Beaver River, thence up and with, the south bank of Beaver River to the 100th degree of west longitude, thence south with said 100th degree of longitude, to the [fol. 57] 46th parallel of latitude, thence west with said parallel of latitude to the place of beginning.

As a further reason for said request, I would respectfully state, that from the information now in my possession, it is believed that the Agency buildings, as now located at Standing Rock, are outside the reservation as defined by treaty of April 29, 1868, [Stat. at L. Vol. 15, p. 635] but are included in the tract proposed to be withdrawn.

I enclose, herewith, a portion of a map showing the supposed location of said Agency buildings and the tract of country proposed to be withdrawn for Indian purposes, and the draft of an Executive Order covering said description.

Very respectfully, Your obt. servant, Edw. P. Smith, Commissioner.

The Hon. Secretary of the Interior.

[fol. 58] DEFENDANT'S EXHIBIT No. 9

Department of the Interior

Washington, D. C., March 15, 1875.

SIR:

Concurring in the recommendation of the Commissioner of Indian Affairs, contained in the accompanying report, dated the 13th instant, I have the honor to request the signature of the President, to the enclosed draft of an Executive Order for the enlargement of the Sioux reservation in Dakota, the same being deemed necessary for the suppression of the liquor traffic with the Indians at the Standing Rock Agency.

Very respectfully, Your obedient servant, C. Delano, Secretary.

The President.

[fol. 59] DEFENDANT'S EXHIBIT No. 10.

Department of the Interior

Washington, D. C., March 16, 1875.

SIR:

I return herewith, signed by the President, the draft of Executive order for the enlargement of the Sioux reservation in Dakota, which was submitted with your letter of the 13th instant.

Very respectfully, Your obt. servant, C. Delano, Secretary.

The Commissioner of Indian Affairs.

[fol. 60] DEFENDANT'S EXHIBIT No. 11

March 9th.

SIR:

I transmit, herewith, for your information, a copy of an Executive Order, dated March 16, 1875, for the enlargement of the Sioux Indian reservation in Dakota Territory—the same being deemed necessary for the suppression of the liquor traffic with the Indians at the Standing Rock Agency.

Very respectfully, Edw. P. Smith, Commissioner.

E. A. Howard, Esq., U. S. Indian Agent, Spotted Tail Agency, White Clay, Dakota, via Fort Laramie, Wyoming.

[fol. 61] DEFENDANT'S EXHIBIT No. 12

March 10th —5.

SIR:

I transmit herewith for your information, a copy of an Executive Order dated March 16, 1875, for the enlargement of a Sioux Indian reservation in Dakota Territory, the same being deemed necessary for the suppression of the liquor traffic with the Indians at the Standing Rock Agency.

Very respectfully, Your obt. servant, Edw. P. Smith, Commissioner.

H. F. Livingston, Esq., U. S. Indian Agent, Crow Creek Agency, Dakota Territory.

[fol. 62] DEFENDANT'S EXHIBIT No. 13

March 19th —5.

SIR:

I have the honor to transmit for your information, the following Executive Order for the enlargement of the Sioux reservation, in Dakota Territory, the same being deemed necessary for the suppression of the liquor traffic with the Indians at the Standing Rock Agency.

[Here follows exact copy of the Executive Order of March 16, 1875.]

Very respectfully, Your obt. servant, Edw. P. Smith, Commissioner.

Hon. Commissioners of the Genl. Land Office.

[fol. 63] DEFENDANT'S EXHIBIT No. 14

March 19th —5.

SIR:

I transmit, herewith, for your information, a copy of an Executive Order, dated March 16, 1875, for the enlargement of the Sioux Indian Reservation in Dakota Territory, the same being deemed necessary for the suppression of the liquor traffic with the Indians at the Standing Rock Agency.

Very respectfully, Your obt. servant, Edw P. Smith, Commissioner.

J. J. Saville, Esq., U. S. Indian Agent, Red Cloud Agency, via Cheyenne, Wyoming.

[fol. 64] DEFENDANT'S EXHIBIT No. 15

March 19th —5.

SIR:

I transmit, herewith, for your information, a copy of an Executive Order, dated March 16, 1875, for the enlarg-ment of the Sioux Indian reservation in Dakota Territory, the same being deemed necessary for the suppression of the liquor traffic with the Indians at the Standing Rock Agency.

Very respectfully, Edw. P. Smith, Commissioner.

H. W. Bingham, U. S. Indian Agent, Cheyenne River Agency, Dakota Territory.

[fol. 65] DEFENDANT'S EXHIBIT No. 16

March 19th —5.

SIR:

I transmit, herewith, for your information, a copy of an Executive Order, dated March 16, 1875, for the enlargement of the Sioux Indian reservation in Dakota Territory

—the same being deemed necessary for the suppression of the liquor traffic with the Indians at the Standing Rock Agency.

Very respectfully, Your obt. servant, Edw. P. Smith, Commissioner.

Edmond Palmer, Esq., U. S. Indian Agent, Standing Rock Agency, Dakota Territory.

[fol. 66] DEFENDANT'S EXHIBIT No. 17

Territory of Dakota

Executive Office

Yankton, Dakota, April 29, 1875.

Hon. E. P. Smith, Commissioner of Indian Affairs, Washington, D. C.

SIR:

I have the honor respectfully to submit the accompanying petition, but without any specific recommendation, for the reason that I know of no law whereby the money relief prayed for can be granted, and because as I understand it their rights of property already acquired there are not intended to be impaired by the Executive order referred to.

They allege that their immediate cause of complaint is, however, that in consequence of the order the Indians will not permit them to continue their improvements or prosecute their works of husbandry.

The petition is respectfully forwarded for such action as the government may be pleased to take thereon, if any.

I have the honor to be, Sir,

Your obedient servant, John L. Pennington, Governor.

[fol. 67] DEFENDANT'S EXHIBIT No. 18

May 4th —5.

SIR:

I transmit herewith for your information a letter dated the 27th ultimo from Gov. J. L. Pennington of Yankton,

Dakota—together with the petition of citizens of Buffalo County D. F. therein mentioned—upon the subject of damages sustained by said citizens by reason, as alleged, of Executive Order of January 11, 1875, extending Sioux reservation.

In view of the statements contained in the papers above noted you are hereby instructed to direct the proper Indian Agents to restrain the Indians and forbid their molesting the settlers—and to inform the petitioners that the views of Gov. Pennington are correct and that the Executive Order was not intended to interfere in any manner with their peaceful occupancy of the country, but to prevent the introduction of whisky into the reservation, and that there must be no further interference with the settlers.

Very respectfully, Your obt. servant, C. Delano, Secretary.

The Commissioner of Indian Affairs.

[fol. 68] DEFENDANT'S EXHIBIT No. 19

May 8th —5.

SIR:

I send you herewith enclosed, copy of a letter from Governor Pennington of Dakota, dated the 27th ultimo, and copy of petition enclosed by him from citizens of Buffalo County, Dakota, presenting claims for damages sustained by said citizens by reason as alleged, of Executive Order of January 11th, 1875, extending the Sioux reservation.

I also enclose copy of Department letter to this office dated the 4th instant, and in accordance with the instructions therein you are directed to restrain the Indians and forbid their molesting the settlers, and inform the petitioners that the views of Governor Pennington are correct, and that the Executive Order was not intended to interfere in any manner with their peaceful occupancy of the country, but to prevent the introduction of whisky into the reservation, and that there must be no further interference with the settlers.

Very respectfully, Your obt. servant, Edw. P. Smith, Commissioner.

H. F. Livingston, Esq., U. S. Indian Agent, Crow Creek Agency, Dakota.

[fol. 69] DEFENDANT'S EXHIBIT No. 20

May 8th —5.

SIR:

I send you herewith enclosed copy of a letter from Governor Pennington of Dakota, dated the 27th ultimo, and copy of petition enclosed by him from citizens of Buffalo County, Dakota, presenting claims for damages sustained by said citizens, by reason as alleged, of Executive Order of January 11th, 1875, extending the Sioux reservation.

I also enclose copy of Department letter to this office dated the 4th instant, and in accordance with the instructions therein you are directed to restrain the Indians and forbid their molesting the settlers, and inform the petitioners that the views of Governor Pennington are correct, and that the Executive Order was not intended to interfere in any manner with their peaceful occupancy of the country, but to prevent the introduction of whiskey into the reservation, and that there must be no further interference with the settlers.

Very respectfully, Your old servant, Edw. P. Smith, Commissioner.

H. W. Bingham, Esq., U. S. Indian Agent, Cheyenne River Agency, Dakota.

[fol. 70] DEFENDANT'S EXHIBIT No. 21

War Department

Washington City, May 13th 1875.

4139.

To the Honorable, The Secretary of the Interior.

SIR:

I have the honor to transmit, for your consideration, copy of a communication from Lieut. Colonel Lugenbeel, dated, Fort Randall, Dakota Territory, April 23rd, relative to portions of the river front, near the Sioux reservation, being the resort of whisky dealers, horse thieves, &c., also that whisky is sold on a similar piece of land near the Yankton reservation, &c.

Very respectfully, Your obedient Servant, Wm. H. Belknap, Secretary of War.

[fol. 71] Copy

Headquarters Southern District, Department of Dakota

Fort Randall, D. T., April 23, 1875.

Assistant Adjutant General, Department of Dakota, Saint Paul, Minn.

Sir:

The Executive Order of January 11th, 1875, extending the Sioux Indian reservation across the Missouri river, still leaves about five miles of river front outside of any reservation.

From this point where the 99 meridian strikes the Missouri river to the upper end of this military reservation, is this strip of land, thus affording a nice point for whisky sellers and horse thieves.

There is also a small gore of land on the river between the upper end of the Yankton reservation and the lower end of the Fort Randall Military reserve, where a man named Ellis has a low whisky doggery.

If these two points could be embraced in some reservation, the river from Chateau Creek to the 46th parallel would be entirely free from the presence of whisky sellers, & the outlaws who now take refuge there would return to the States, as they could not feel contented without imbibing ardent spirits.

[fol. 72] It would also better the condition of the Indians, and the soldiers of the different garrisons would be better in health and disposition.

Very respectfully, Your obedient servant: (sd.) Pinkney Lugenbeel, Lieut. Colonel 1st Inf., Comd'g District.

[fol. 73] Defendant's Exhibit No. 22

May 18 — 5

Sir:

I have the honor to acknowledge the receipt, by reference from you, for consideration and recommendation, of a letter of 13th instant from the Hon. Secretary of War, transmitting copy of a communication from Lt. Col. Lugenbeel, dated Fort Randall, D. T. April 23, 1875, relative to the

sale of whisky at certain points on the Missouri river, not embraced in any Indian or military reservation, and suggesting that some action be taken to embrace the points in question in some reservation.

I would respectfully state that the tract of country in Dakota Territory, lying south of an East and West line from the Northwest corner of the Yankton Indian reservation to the 99th degree of West longitude; and between the Missouri river and the Yankton reservation might be embraced within the Sioux reserve, by extending its limits, by executive order, so as to cover said tract. How to reach the party named Ellis, who occupies the gore of land within the Military reservation of Fort Randall, referred to, by Col. Lugenbeel, as keeping "a low whisky doggery," would be a question more difficult of solution, inasmuch as he is one of the 19 persons reported to the Department, by the Hon. Secretary of War, under date of the 22d ultimo, as being entitled to the relief provided for by Act of Congress, entitled "An Act for the relief of certain settlers on the Fort Randall Military reservation" approved May 18, [fol. 74] 1874 [Pamph. Ed. Laws 1st Session 43d Congress, chap. 182, p. 47].

As the existing rights of Mr. Ellis would not be affected by the issue of an Executive Order extending the limits of the Sioux reserve over his claim. I can, therefore, only recommend the issue of an order by the President withdrawing from sale or settlement the first named tract of country, and setting it apart for Indian purposes. With a view to that end, I submit, herewith, a draft of such an Executive Order.

The Communication of the Hon. Secretary of War is herewith returned.

Very respectfully, your obt. servant, Edw. P. Smith,
Commissioner.

Hon. Secretary of the Interior.

[fol. 75] DEFENDANT'S EXHIBIT No. 23

Department of the Interior

Washington, D. C., May 19th, 1875.

SIR:

Concurring in the recommendation of the Commissioner of Indian Affairs, contained in the accompanying report

dated the 18th instant, I have the honor to request the signature of the President to the enclosed draft of an Executive Order, withdrawing from sale and setting apart a certain tract of country in the Territory of Dakota, therein described, as an addition to the Sioux Reservation.

I have the honor to be,

Very respectfully, your obt. servant, B. R. Cowen, Acting Secretary.

The President.

[fol. 76] DEFENDANT'S EXHIBIT No. 24

Department of the Interior

Washington, D. C., May 21st, 1875.

SIR:

I return, herewith, signed by the President the draft of Executive Order, withdrawing from sale and setting apart a certain tra t of country in the Territory of Dakota, therein described, as an addition to the Sioux Reservation, which was submitted with your letter of the 18th instant.

Very respectfully, your obt. servant, B. R. Cowen, Acting Secretary.

The Commissioner of Indian Affairs.

[fol. 77] DEFENDANT'S EXHIBIT No. 25

May 24th —5.

SIR:

I enclose, herewith, for your information and the files of your office, a copy of an Executive Order dated May 20, 1875, withdrawing a certain tract of country in the Territory of Dakota, from sale or settlement, and setting apart the same as an addition to the Great Sioux Indian reservation.

Very respectfully, your obt. servant, H. R. Clinn, Acting Commissioner.

H. F. Livingston, Esq., U. S. Ind. Agent, Crow Creek Agency, Dak. Ter.

[fol. 78] DEFENDANT'S EXHIBIT No. 26

May 24, —5.

SIR:

I enclose herewith, for your information and the files of your office, a copy of an Executive Order, dated May 20, 1875, withdrawing a certain tract of country in the Territory of Dakota from sale or settlement, and setting apart the same as an addition to the Great Sioux Indian Reservation.

Very respectfully, Your obt. servant, H. R. Clinn, Acting Commissioner.

H. W. Bingham, Esq., U. S. Ind. Agent, Cheyenne River Agency, Dak. Terr.

[fol. 79] DEFENDANT'S EXHIBIT No. 27

May 24, —5.

SIR:

I enclose, herewith, for your information and the files of your office a copy of an Executive Order dated May 20, 1875, withdrawing a certain tract of Country, in the Territory of Dakota, from sale or settlement, and setting apart the same as an addition to the Great Sioux Indian reservation.

Very respectfully, your obt. servant, H. R. Clinn, Acting Commissioner.

John G. Gassman, Esq., U. S. Ind. Agent, Yankton Agency, Dak. Ter.

[fol. 80] DEFENDANT'S EXHIBIT No. 28

U. S. Indian Agency

Standing Rock, D. T.

November 7th, 1876.

To the Commissioner of Indian Affairs, Washington, D. C.

SIR:

I have the honor to state that along the North bank of Beaver River are now settled numbers of white men who

make a business of selling liquor and ammunition to the Indians thus proving a source of constant trouble and annoyance. I have, also, every reason to believe that these men sell, to the hostiles, all the ammunition they or their emissaries can purchase.

I herewith submit an outline draught of the Executive Additions to this Reservation, made in the Spring of 1875, together with a *proposed* Addition embracing a tract subscribed as follows:

Commencing at the extreme Eastern corner of the Military Reservation of Fort Rice, D. T.; thence South-westerly to the Missouri River; thence, southerly, along said River to the mouth of Beaver River; thence, North-easterly, along said Beaver River, to the North-east corner of the present Reservation; thence Westwardly to the starting-point.

I would respectfully request that the above described tract be made an Executive Addition to this Reservation as soon as possible to that the illegal traffic carried on therein may be stopped.

I am Sir

Very Respectfully, Your obedient servant, R. E. Johnston, Captain 1st Infantry, Acting Indian Agent.

[fol. 81] DEFENDANT'S EXHIBIT No. 29

November 24, 1876.

The Honorable the Secretary of the Interior.

SIR:

Under date of the 7th instant, R. E. Johnston, Capt. 1st Infantry, and Acting U. S. Indian Agent at Standing Rock, D. T., reports that along the north bank of Beaver River are now settled numbers of white men who make a business of selling liquor and ammunition to the Indians, thus proving a source of constant trouble and annoyance at the Agency. He is, moreover, led to believe, these are the parties who are supplying the hostile Indians with all the ammunition they can purchase. With a view to the suppression of this traffic, I have the honor to recommend that the President be requested to issue an order withdrawing

from sale or settlement all that tract of country, in Dakota, on the East side of the Missouri river, lying within the following boundaries, viz: commencing at a point on the South bank of the Beaver River, intersected by the 100th degree of West Longitude, thence in a direct line to the East corner of the Fort Rice Military reservation, thence southwestwardly along the line of said Military reservation to the east bank of the Missouri river, thence with the East bank of the Missouri to the mouth of Beaver river, thence up and with the south bank of Beaver river to the place of beginning.

The adoption of this order will effectually cut off these [fol. 82] whisky dealers, in their nefarious traffic, from all approach to the Missouri river, from the Yankton Agency to Bismarck. It is not proposed to interfere with the vested rights, or the legitimate business of any settler who may be upon this tract. I submit herewith a draft of such order and a diagram furnished by Capt. Johnston, showing the tract in question.

I have the honor to be

Very respectfully, J. Q. Smith, Commissioner.

Stand. Rock J. 1052.

[fol. 83] DEFENDANT'S EXHIBIT No. 30

Department of the Interior

Washington

November 28th, 1876.

Sir:

I have the honor to submit herewith a letter dated 24th instant from the Commissioner of Indian Affairs, recommending the withdrawal from sale or settlement and setting apart for Indian purposes a certain tract of country in Dakota together with the reasons therefor..

A draft of Executive Order to effect the purpose indicated, which has the approval of this Department, is also herewith respectfully submitted.

I have the honor to be, Sir,

Very respectfully, Your obedient servant, Z. Chandler, Secretary.

The President.

[fol. 84] DEFENDANT'S EXHIBIT No. 31

Department of the Interior

Washington

December 11, 1876.

SIR:

Referring to your report of 24th ultimo upon the subject of withdrawing from sale certain land in Dakota on the East side of the Missouri River, I transmit, herewith, an Executive Order, dated 28th ultimo, withdrawing from sale and setting apart for the use of the Sioux, and as an addition to their present reserve in Dakota, the tract of land therein described.

Very respectfully, Your obt. servant, Z. Chandler, Secretary.

The Commissioner of Indian Affairs.

[Copy of Order of Nov. 28, 1876 attached.]

[fol. 85] DEFENDANT'S EXHIBIT No. 32

December 13, —6.

Wm. F. Hughes, U. S. Indian Agent, Standing Rock Agcy., Dakota.

SIR:

Referring to letter of Captain R. E. Johnston, dated the 7th ultimo, I transmit, herewith, for the files of your office, a copy of an Executive Order, dated November 28, 1876, setting apart the tract of country east of the Missouri River between Beaver River and Fort Rice, as an addition to the Sioux Reserve with a view to the suppression of the liquor traffic upon the Missouri River between the aforesaid points. This order does not affect and is not intended to interfere with the vested rights of any settlers upon this tract or with the legitimate business pursuits of any person lawfully residing within its limits.

Very respectfully, J. Q. Smith, Commissioner.

Dakota I 1126.
Standing Rock I 1052.

[fol. 86] DEFENDANT'S EXHIBIT No. 33

December 13, ——6.

The Commissioner of the General Land Office.

SIR:

I have the honor to advise you that the boundaries of the Sioux Indian Reservation in Dakota, have been extended on the East side of the Missouri river with a view to the suspension of the liquor traffic upon the Missouri river from Beaver River to Fort Rice military reservation by the order of the President, of which the following is a copy.

"Executive Mansion"

"November 28, 1876.

"It is hereby ordered that the tract of country in the Territory of Dakota, on the east side of the Missouri river lying within the following boundaries, viz: Commencing at a point on the south bank of Beaver river intersected by the 100th degree of West Longitude thence in a direct line to the east corner of the Fort Rice military reservation, thence in a south western direction along the said military reservation to the east bank of the Missouri river, thence with the east bank of the Missouri to the mouth of Beaver river thence up and with the south bank of Beaver river to the place of beginning be and the same hereby is withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

U. S. Grant.

[fol. 87] Very respectfully, Your obt. servant, J. Q. Smith, Commissioner.

Dakota I 1126-76

[fol. 88] DEFENDANT'S EXHIBIT No. 34

373 "L" 2 enclosures

Dakota

"L" 856. 1879 June 6, ——9.

The Honorable, The Secretary of the Interior.

SIR:

I have the honor to acknowledge the receipt, by your reference for report, of a communication dated Cleveland,

Ohio, the 28th ultimo, from John W. Street, Esqr, in reference to the formation of a colony for homestead settlement in Brule and Cragin Counties, Dakota Territory, and in which he requests a modification of the eastern boundary of the Sioux Indian Reservation as fixed by Executive Orders of January 11, and May 20, 1875, so as to establish a line or door-way of communication by the Missouri River in Southern Dakota, for the settlers who are now rapidly locating in that part of the Territory. This office is also in receipt of a letter, herewith, from Mr. Street dated the 8th ultimo upon the same subject.

The treaty of April 29th, 1868 (Stat. 15, p. 635) defines the eastern boundary of the Sioux Indian Reservation as low water mark on the eastern bank of the Missouri River, from the 46th parallel of north latitude, to where the northern line of the State of Nebraska strikes the river, with the exception of retaining for the use of the Indians the three small existing reservations on the east bank of said river.

[fol. 89] This left open for settlement a large tract of country bordering on the east bank of the Missouri River, not embraced in the reservations retained.

The ready access to the Indians thus obtained was taken advantage of by white men who infested the country for the purpose of carrying on the liquor traffic; and in 1874, and in 1875, this traffic had gained such proportions that it was deemed necessary to take some positive steps to suppress it, accordingly the Executive Orders of January 11th, 1875 and May 20th, 1875 (Report 1878, pp. 247, 248) were issued, extending the eastern boundary of the reservation, to the 99 degree of west longitude, from the 48 parallel of north latitude, to the Missouri river, including the small tract of country South, of an east and west line, from the north-west corner of the Yankton Reservation to said 99 degree of longitude.

These orders effectually cut off all unlawful communications with the Indians on the Missouri, and to a great extent accomplished the object desired, viz: the prevention of the sale of whisky to the Indians.

It is the opinion of this office that the restoration to the public domain of the whole or any part of the lands bordering on Missouri set apart by the Executive Orders above referred to, would again open, and give renewed life to this unlawful traffic, and be detrimental to the best interests

of the Indians, and I must therefore respectfully decline to recommend any change in or modification of the boundar-
[fol. 90] ies of the reservation as now existing.

The letter of Mr. Street is, herewith, returned, and the return of his letter addressed to this office is respectfully requested.

Very respectfully, Your obedient servant, E. J. Brooks, Acting Commissioner.

Finch

[fol. 91] DEFENDANT'S EXHIBIT No. 35

"L"
Dakota
S 856 1879

June 27, —9.

The Honorable, the Secretary of the Interior.

SIR:

Referring to Office report of the 6th instant, declining, for reasons stated therein, to recommend the restoration to the public domain of the lands set apart, as an addition to the Sioux Indian reservation in Dakota, by Executive Orders dated January 11th, March 16th, May 20th, 1875, and November 28th, 1876, I have the honor to state that, after a careful reconsideration of the subject, this office is of the opinion that the lands set aside by the above named Executive Orders, with the exceptions hereinafter named, might be restored to the public domain, and the interests of the Indians still be protected.

These lands were set apart for the purpose, as alleged, of preventing illegal liquor traffic with the Indians. At the time, said lands were set apart there was no law providing a punishment for the sale of liquor to Indians, "except to Indians in the Indian country", but, by the Act of February 27, 1877, (19 Stat. 244) persons who now engage in liquor traffic with Indians, no matter in what locality, are liable to a penalty of $300, and two years imprisonment, and, therefore, the necessity for so large a reservation for the
[fol. 92] protection of these Indians, in this respect does not now exist.

Those Indians located at the Crow Creek and Lower Brule agencies, are protected by the Winnebago and Crow Creek

reservations, established by treaty. The remaining agencies, to wit, Cheyenne, Grand River, and Standing Rock, can be sufficiently protected by excepting from the order restoring to the public domain, the lands heretofore reserved, the following tracts, to wit: Beginning at the north-east corner of Ft. Sully Military reservation, thence due north to the Missouri River, also beginning at the mouth of the Bois Cache; thence due north to the Missouri River; and also, townships 129, 130, 131, and that part of township 132, north, lying south of Beaver Creek, Range 79 west, bordering on the Missouri River.

I, therefore, have had prepared and submit, herewith, a draft of an Executive Order, returning to the public domain the lands set apart by the Executive Orders above referred to, with the exceptions hereinbefore mentioned.

Very respectfully, Your obt. servt., E. A. Hayt, Commissioner.

(Maxwell)

[fol. 93] DEFENDANT'S EXHIBIT No. 36

Department of the Interior

WJV.

Washington, Aug. 11th, 1879.

The Commissioner of Indian Affairs.

SIR:

I transmit, herewith, an Executive Order of the 9th instant, restoring to the public domain, certain lands in Dakota Territory, heretofore reserved for the purpose of preventing illegal liquor traffic with the Sioux.

This was the subject of your letter of 27th of June last, presenting draft for such order.

A copy of the order has this day been referred to the Commissioner of the General Land Office, for his information.

Very respectfully, C. Schurz, Secretary.

(1228)
1 enclosure.

[fol. 94] DEFENDANT'S EXHIBIT No. 37

Department of the Interior

Office of Indian Affairs

Washington, D. C., March 14, 1884.

Land
1102-1105 '84
3971-4877
10154, 1884.

The Honorable, The Secretary of the Interior.

SIR:

By Executive Orders dated, respectively, January 11, March 16, and May 20, 1875, and November 28, 1876, certain tracts of country east of the Missouri River in Dakota, were withdrawn from sale and settlement and set apart as additions to the Great Sioux Reservation, established by treaty of April 29, 1868, the object being the suppression of the liquor traffic with the Indians of said reservation.

By a subsequent order—dated August 9, 1879—all the territory withdrawn by the orders abovementioned was restored to the public domain with the exception of three small tracts,—one opposite the Standing Rock Agency, one opposite the mouth of Grand River, and one opposite the mouth of the Big Cheyenne River.

It was thought best at that time to retain the three tracts referred to as a means of protection to the agencies on the other side of the Missouri—the Standing Rock, Grand River, and Cheyenne River Agencies.

The Grand River Agency no longer exists, and the agents at Standing Rock and Cheyenne River Agencies report that the Executive additions opposite their respective agencies are no longer required for the purpose for which they were originally intended, and recommended that they be restored to the public domain.

[fol. 95] I have before me two petitions numerously signed by settlers, praying for the restoration of the lands opposite Grand River and the Cheyenne River Agencies. They were presented by Hon. John B. Raymond, Delegate from Dakota, with an urgent recommendation for the opening of the lands to lawful settlement. Upon receipt of said

petitions, I took pains to ascertain whether the three reserved tracts, or either of them, are longer needed for the purpose for which they have thus far been retained, and I am satisfied that they are not. The agent at the Standing Rock Agency so declares as regards the tract opposite his agency and the one opposite the old Grand River Agency, and the agent at the Cheyenne River Agency as regards the one opposite that agency.

Under date of March 11th (instant) you referred a letter to this Office from Hon. Angus Cameron, asking in behalf of settlers whether the lands opposite Grand River could not with propriety be restored to the public domain. He states that the adjoining lands are occupied by actual settlers who are anxious to have the reserved lands opened to settlement, and he sees no good reason whey they should not be.

Having fully considered the matter I respectfully recommend that the three several tracts referred to be restored to the mass of the public domain, and in furtherance of this purpose I have had a draft of an Executive Order prepared and enclose the same herewith, together with a map upon which the several reservations are laid down.

The letter of Senator Cameron is returned with this report.

Very respectfully, Your obedient servant, H. Price, Commissioner.

(Larrabee)

[fol. 96] DEFENDANT'S EXHIBIT No. 38

United States Senate, Room of the Committee on Claims

Washington, D. C., March 8, 1884.

Hon. Henry M. Teller, Secretary of the Interior.

SIR:

There is a small reservation established by Executive order in Dakota on the east side of the Missouri river being a part of fractional township 123, range 79. There formerly was an Indian Agency at the mouth of the Grand River, opposite the reservation above mentioned. The reservation when established was of considerable extent,

but all except this fractional township has been restored to the public domain.

I presume this small remnant of the reservation was not restored to the public domain for the reason that it was opposite the then Indian Agency at the mouth of Grand River; but inasmuch as that agency has been discontinued, I can see no good reason for not restoring the present reservation to the public domain.

There is not, and has not been for years a single Indian upon this reservation. They do not seem to know and I think do not know that it was not restored to the public domain with the remainder of the original reservation. The land adjoining this reservation is occupied by actual settlers and they very much desire that this small remainder of the reservation shall be thrown open for settlement.

Will you please have the matter examined and advise me whether or not, in your opinion, the Executive order establishing this reservation ought to be revoked and the land thrown open for settlement.

Truly yours, Angus Cameron.

[fol. 97] DEFENDANT'S EXHIBIT No. 39

RVB Department of the Interior W.H.C.

Washington, March 22, 1884.

The Commissioner of Indian Affairs.

SIR:

I transmit, herewith, an Executive Order of the 20th, inst. restoring to the public domain certain lands therein described situated on the East side of the Missouri River in Dakota Territory, heretofore withdrawn and made Executive additions to the Sioux reservation as therein noted; which Order was the subject of recommendation in your letter of 14th. instant.

The enclosures of your letter are also herewith, returned.

Very respectfully, C. U. Joslyn, Acting Secretary.

AYC.

1117 Ind. Div. '84.

3 enclosures.

The enclosures referred to above were the Ex order and letter of Senator Angus Cameron 4877—which letter is filed in its proper place and order in the files.

[fol. 98] Clerk's Certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 46,126. Court of Claims. Term No. 798. The Sioux Tribe of Indians, Petitioner, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed December 12, 1941. Term No. 798, O. T., 1941.

[fol. 99] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 9, 1942

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 12 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 798

THE SIOUX TRIBE OF INDIANS,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

RALPH H. CASE,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Opinion below	1
Jurisdiction	1
Statement	1
Statutes involved	3
Questions presented	10
Specifications of error to be urged	12
Reasons for granting the writ	14
Brief in support of petition	16
Summary	18
Conclusion	19

Case Cited.

United States v. *Midwest Oil Co.*, 236 U. S. 459	18

Statutes Cited.

Act of February 13, 1862, 12 Stat. 339	9
Act of February 27, 1877, 19 Stat. 244	10, 12
Act of June 30, 1919, Sec. 27 (41 Stat. 3)	18
Act of June 3, 1920, 41 Stat. 728	3
Act of February 13, 1925, Sec. 3(b)	1
Treaty of April 29, 1868 (15 Stat. 635)	1, 2, 4, 11
Revised Stats. 1873, Sec. 2139 (Act of June 22, 1874, 18 Stat., Vol. 1, 113)	10
Revised Stats. 1878, 2d Ed., Sec. 2139, p. 373	10

Executive Orders.

January 11, 1875—Kappler, Vol. 1, 898	6
March 16, 1875—Kappler, Vol. 1, 884	6
May 20, 1875—Kappler, Vol. 1, 898	6
November 28, 1876—Kappler, Vol. 1, 884	7
August 9, 1879—Kappler, Vol. 1, 889	8
March 20, 1884—Kappler, Vol. 1, 884	9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 798

THE SIOUX TRIBE OF INDIANS,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The Sioux Tribe of Indians, by its attorney, Ralph H. Case, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case April 7, 1941, Court of Claims Docket Number C-531-(8), motion for new trial overruled October 6, 1941 (R. 30).

Opinion Below.

The opinion of the Court of Claims is not yet reported.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

Statement.

The petitioner comprises those Indians or their descendants of the Sioux Tribe who were parties to the Treaty of

1*d*

April 29, 1868 (15 Stat. 635). That treaty set apart a permanent reservation for the Sioux Tribe, the easterly boundary of which was the east bank of the Missouri River, but including two small reservations on the east bank of the river (now the Crow Creek Reservation).

The treaty further provided for the cession of all lands east of the Missouri River to the United States, except Crow Creek Reservation.

The proposed treaty included the bands of the Sioux Tribe living on the east side of the Missouri River. These were the Upper Yanktonai and the Lower Yanktonai bands of Sioux Indians. They objected to the terms of the treaty but signed when they were assured by the Treaty Commissioners that an effort would be made to extend the permanent reservation so as to include the James River country east of the Missouri River. The Yanktonai bands, however, did not move onto the permanent reservation but remained in the area east of the Missouri River.

By three Executive Orders in 1875 and one in 1876 (R. 9-14) lands on the easterly side of the Missouri River were "withdrawn from sale and set apart for the use of the several tribes of the Sioux Indians as an addition to their present reservation in said territory" (Dakota). The Yanktonai bands, in common with the other bands of the Sioux Tribe, continued to use and occupy the territory east of the Missouri River covered by the Executive Orders.

In 1879 and in 1884, by Executive Orders (R. 16, 18), all of the land added by the previous Executive Orders was restored to the public domain. The Sioux Indians living on the east side of the Missouri River were moved to the west side of the Missouri River except a small number of the Lower Yanktonai band, which was removed to the Crow Creek Indian Reservation.

The petitioner claims that the Executive Orders of 1875 and 1876 gave the Sioux Tribe the same right to the lands

added to the permanent reservation as the Treaty of 1868 granted to the Sioux Tribe in the permanent reservation. The Sioux Tribe was never consulted in regard to the orders restoring these lands to the public domain. The tribe has never received compensation in any form or in any amount for the property right in the lands which were taken from them by the Executive Orders of 1879 and 1884. The area involved is 5,667,016.74 acres (R. 5).

Statutes Involved.

The material provisions of the Jurisdictional Act under which this cause of action is brought are as follows (Act of June 3, 1920, 41 Stat. 728).

> "That all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said tribe from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon.
>
> "Sec. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding lapse of time or statutes of limitations, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all

sums heretofore paid or expended for the benefit of said tribe or any band thereof. The claim or claims of the tribe or band or bands thereof may be presented separately or jointly by petition, subject, however, to amendment, suit to be filed within five years after the passage of this Act; and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant, and any band or bands of said tribe or any other tribe or band of Indians the court may deem necessary to a final determination of such suit or suits may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys, employed by said Sioux Tribe or any bands thereof, shall set forth all the facts on which the claims for recovery are based, and said petition shall be signed by the attorney or attorneys employed, and no other verification shall be necessary. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said tribe or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said tribe or bands of Indians." (R. 2-3)

The material provisions of the Treaty of April 29, 1868 (15 Stat. 635) are as follows:

"Article 2. The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all ex-

isting reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided."

"Article 12. No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in article 6 of this treaty."

The material provisions of the Executive Orders adding lands to the permanent reservation of the Sioux Tribe are as follows:

"Commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same; thence east with said parallel of latitude to the ninety-ninth degree of west longitude; thence south with said degree of longitude to the east bank of the Missouri River; thence up and with the east bank of said river to the place of beginning, be, and the same

hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians, as an addition to their present reservation in said Territory."

(January 11, 1875. Kappler, Vol. 1, 898.)

"Commencing at a point where the one hundred and second degree of west longitude intersects the forty-sixth parallel of north latitude; thence north on said one hundred and second degree of longitude to the south bank of the Cannon Ball River; thence down and with the south bank of said river to a point on the east side of the Missouri River opposite the mouth of said Cannon Ball River; thence down and with the east bank of the Missouri River to the mouth of Beaver River; thence up and with the south bank of Beaver River to the one hundredth degree of west longitude; thence south with said one hundredth degree of longitude to the forty-sixth parallel of latitude; thence west with said parallel of latitude to the place of beginning, be and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians, as an addition to their present reservation in said Territory."

(March 16, 1875. Kappler, Vol. 1, 884.)

"It is hereby ordered that that portion of the public domain in the Territory of Dakota lying south of an east and west line from the northwest corner of the Yankton Indian Reservation to the ninety-ninth degree of longitude, and between said longitude and the Missouri River on the west and the Yankton Indian Reservation on the east, be, and the same hereby is, withdrawn from sale and settlement, and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said territory."

(May 20, 1875. Kappler, Vol. 1, 898.)

"Commencing at a point on the south bank of Beaver River, intersected by the one hundredth degree of west longitude; thence in a direct line to the east corner of the Fort Rice Military Reservation; thence in a south-

western direction along the said military reservation to the east bank of the Missouri River; thence with the east bank of the Missouri to the mouth of Beaver River; thence up and with the south bank of Beaver River to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory."

(November 28, 1876. Kappler, Vol. 1, 884.)

The material provisions of the Executive Orders restoring to the public domain the land last above described are as follows:

"It is hereby ordered that all that portion of the Sioux Indian Reservation in Dakota Territory created by Executive orders dated January 11, March 16, and May 20, 1875, and November 28, 1876, lying within the following-described boundaries, viz: Beginning at a point where the west line of the Fort Randall Military Reservation crosses the Missouri River; thence up and along said river to the mouth of American Creek; thence up and along said creek to the ninety-ninth degree of west longitude; thence south along said degree to a point due west from the northwest corner of the Yankton Indian Reservation; thence due east to the northwest corner of said reservation; thence due south to the north boundary line of Fort Randall Military Reservation; thence following said boundary line northwesterly to the northwest corner of said military reservation; thence south on the west boundary line of said reservation to the place of beginning. And also the following-described land: Beginning at the east bank of the Missouri River at the mouth of Medicine Knoll Creek; thence up and along the Missouri River to the boundary line of Fort Sully Military Reservation; thence northeasterly along said boundary line to the southeast corner of said military reservation; thence northwesterly along the boundary line of said reservation to the northeast corner thereof; thence due north to the east bank of the Missouri River; thence

up and along the east bank of said river to the mouth of the Bois Cache; thence due north to the east bank of said river to the south line of township 129 north; thence east along said township line to the line between ranges 78 and 79 west; thence north along said range line to Beaver Creek, or the north boundary line of the reservation set aside by Executive order of March 16, 1875; thence west along said creek to the east bank of the Missouri River; thence up and along said east bank to the southeast corner of Fort Rice Military Reservation; thence northeasterly along said military reservation to the east corner of said reservation; thence in a direct line to a point on the south bank of Beaver Creek where said creek is intersected by the one hundredth degree of west longitude; thence south with said one hundredth degree of longitude to the forty-sixth parallel of north latitude; thence east with said parallel of latitude to the ninety-ninth degree of west longitude; thence south with said degree of longitude to its intersection with the north boundary line of the old Sioux or Crow Creek Reservation; thence west along the north boundary line of said reservation to the eastern boundary line of the old Winnebago Reservation; thence north along said east line to the northeast corner of said Winnebago Reservation; thence west along the north boundary line of said reservation to the middle channel of Medicine Knoll Creek; thence down the middle channel of said creek to the place of beginning, be, and the same hereby is, restored to the public domain."

(August 9, 1879. Kappler, Vol. 1, 889.)

"It is hereby ordered that the lands embraced within the three existing Executive additions to the Great Sioux Reservation, in Dakota, east of the Missouri River, viz, the one opposite the Standing Rock Agency, the one opposite the mouth of Grand River and the site of the old Grand River Agency, and the one opposite the mouth of Big Cheyenne River and the Cheyenne River Agency, be, and the same are hereby, restored

to the mass of the public domain, the same being no longer needed for the purpose for which they were withdrawn from sale and settlement."

(March 20, 1884. Kappler, Vol. 1, 884.)

The material provisions of the statutes governing the sale of liquor to Indians and the introduction of liquor into the Indian country are as follows:

"That if any person shall sell, exchange, give, barter, or dispose of any spirituous liquor or wine to any Indian under the charge of any Indian superintendent or Indian agent appointed by the United States, or shall introduce or attempt to introduce any spirituous liquor or wine into the Indian country, such person, on conviction thereof before the proper district court of the United States, shall be imprisoned for a period not exceeding two years, and shall be fined not more than three hundred dollars: PROVIDED, HOWEVER, That it shall be sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country, if it be proved to be done by order of the War Department or of any officer duly authorized thereto by the War Department."

(Act of February 13, 1862. 12 Stat. 339.)

"Sec. 2139. No ardent spirits shall be introduced under any pretense, into the Indian country. Every person, except an Indian, in the Indan country, who sells, exchanges, gives, barters, or disposes of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or agent, or introduces or attempts to introduce any spirituous liquor or wine into the Indian country, shall be punishable by imprisonment for not more than two years, and by a fine of not more than three hundred dollars. But it shall be a sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country, that the acts charged were done by order of or under authority from the War Department, or any

officer duly authorized thereunder by the War Department."

(United States Revised Stats. 1873, Act of June 22, 1874. 18 Stat. Vol. 1, 113.)

"Section twenty one hundred and thirty nine is amended by striking out, in lines two and three, the words 'except an Indian in the Indian country'."

(Act of February 27, 1877, 19 Stat. 244.)

AN ACT

To Revise and Consolidate the Statutes of the United States, in Force on the First Day of December, anno Domini, One Thousand Eight Hundred and Seventy-three.

"Sec. 2139. No ardent spirits shall be introduced, under any pretense, into the Indian country. Every person [except an Indian, in the Indian country][1] who sells, exchanges, gives, barters, or disposes of any spirituous liquors or wine to any Indian under the charge of any superintendent or agent, or introduces or attempts to introduce any spirituous liquor or wine into the Indian country, shall be punishable by imprisonment for not more than two years, and by a fine of not more than three hundred dollars. But it shall be a sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country, that the acts charged were done by order of or under authority from the War Department, or any officer duly authorized thereunto by the War Department."

(United States Revised Statutes, 2nd Ed., 1878, p. 373.)

Questions Presented.

Whether the Sioux Tribe of Indians by virtue of the Executive Orders of January 11, 1875, March 16, 1875, May

[1] Note: The words shown in brackets are in italics. "The portions of the statutes repealed are printed in italics and included in brackets." Geo. S. Boutwell, Commissioner. (U. S. R. S., 2nd Ed., 1878, p. 5.)

20, 1875, and November 28, 1876, obtained title to and a vested interest in the lands by said orders added to the permanent reservation created by the Treaty of April 29, 1868 (15 Stat. 635), such that said title and interest could not be taken from the Sioux Tribe without payment of just compensation.

Whether the Executive Orders of August 9, 1879 and of March 20, 1884, restoring to the public domain the area previously set apart for the use of the Sioux Tribe, and attached to as a part of the permanent reservation of said tribe, is such a taking of private property for public use as to require the payment of just compensation under the Constitution.

Whether an Executive Order withdrawing from the public lands a specified area and attaching such area to an existing Indian treaty reservation, in terms conforming to the terms of a treaty providing for such addition, vests in the Indian Tribe such an interest in the lands covered by the Executive Order that the Indian Tribe cannot be divested of such interest without payment of just compensation.

Whether the Congress, by the Act of June 30, 1919, which expressly prohibited the creation of, or additions to, Indian reservations by Executive Order from and after the date of the act, so recognized the prior Executive practice and so acquiesced in the issuance of all previous Executive Orders similar to those prohibited by the act as to validate all such previous orders, especially in view of the fact that the Act of June 30, 1919, did not revoke nor question such Executive Orders issued prior to that date.

Whether the plain and unambiguous terms of a grant are subject to the undisclosed purposes of the grantor and thereby subject the grant to revocation at will by the grantor, even though it is shown that the reason for the revocation did not in fact exist at the time of revocation.

Specifications of Error to be Urged.

1. The court below erred in three instances in making a distinction between the expression "use" contained in the Executive Orders and the words "use and occupation", as set out in the following holdings:

> "In these four Executive Orders there is the expression 'use' of the several tribes and not the words 'use and occupation' or 'use or occupation' as expressed in the treaty." (R. 23)

> "The actual fee is always in the United States but the use of the terms 'use and occupation', 'use or occupation', or 'occupation' carry such an equitable title in the Indians that the Congress of the United States has always recognized that compensation should be given the Indians for the lands when they are taken." (R. 24)

> "In the instant case the Executive Orders of 1875 and 1876 were withdrawn in 1879 and 1884. For over sixty years the Sioux Indians have not had the use of these lands and even during the periods from 1875 to 1879 and 1884 they had only the use which permitted hunting of buffalo and other game." (R. 29)

2. The court erred in relying upon the statement made by the Commissioner of Indian Affairs to the effect that the Act of February 27, 1877 (19 Stat. 244), amended the United States code of 1873 in respect to the suppression of the liquor traffic in the Indian country, as set out in the following:

> "In 1879, the Secretary of the Interior, who had been advised by the Commissioner of Indian Affairs, recommended that the lands, with certain exceptions, so withdrawn from settlement and sale under the four orders above mentioned, could be restored to the public domain and the liquor traffic with the Indians suppressed, under the act of February 27, 1879 (19 Stat. 244)." (R. 23)

3. The court erred in holding that the additions to the Sioux Reservation made by the Executive Orders was "of a temporary nature", in the following holding:

> "In the case before us, although the Executive Orders did not contain words of a temporary nature, nevertheless, the recommendation of the Commissioner of Indian Affairs to the Secretary of the Interior, on which these Executive Orders were based, showed that the additions were solely for the purpose of regulating the liquor traffic on the Missouri River and the protection of these Indians on their permanent reservation from the injurious and harmful effects of such traffic." (R. 27)

4. The court erred in construing the words of the Treaty of April 29, 1868 (*supra*) in the following holding:

> "The use of the words in the treaty 'or in such territory as may be added to this reservation for the use of said Indians' clearly intended such lands which may be added thereto, either by treaty, which was the sole way by which Congress dealt with these Indian Tribes up to 1871, or by act of Congress after 1871. Congress did not intend by these words to vest in the President the fee to the public domain, or the power to dispose of the title to it, a power which was, under the Constitution, in the Congress alone." (R. 27)

5. The court erred in holding that Congressional ratification by a specific act of Congress was necessary to give full effect to the Executive Orders here in question in the following holding:

> "It would have required some act of Congress by prior legislation, or subsequent ratification of the Executive Orders, in order to divest the United States of its title to the land and place it elsewhere." (R. 27)

6. The court erred in holding that the Sioux Tribe did not obtain by the Executive Orders any interest for which

the United States are responsible, either in law or in equity in the following holding:

> "The Sioux Nation did not get by these four Executive Orders, adding land to their permanent reservation, any interest for which the Government is responsible either in law or in equity." (R. 28)

7. The court erred by taking into consideration the several errors heretofore set out and by process of adding error to error, reaching the conclusion that the undisclosed intent of the United States left with the United States the power to revoke the Executive Orders of 1875 and 1876 and that the several Executive Orders were temporary in their nature and could be withdrawn at any time, in the following holding:

> "Taking all these matters into consideration, it seems clear that in issuing the Executive Orders of 1875 and 1876, which added some six million and odd acres to the Sioux treaty reservation, it was intended as a temporary expedient in order to protect the Indians from the injurious and nefarious liquor traffic, and the orders were temporary in their nature and could be withdrawn at any time and were withdrawn in 1879 and 1884." (R. 30)

Reasons for Granting the Writ.

The petitioner asserts that its property was taken from it without the payment of just compensation, thereby raising a consitutional question.

The Court of Claims has held that the President of the United States was without power to issue the Executive Orders of 1875 and 1876, thereby raising the question of the right of the Executive to issue such orders as was done by the Executives over a period of fifty years. If the decision of the Court of Claims is final then none of the Executive Orders creating or enlarging Indian reservations is of any effect and any land within such reservations, title to which

has not passed to an individual allottee by patent, can be taken from the Indian Tribe without payment of compensation. This question is not only vital to the rights of petitioners, but is so important to the rights of Indians occupying reservations created or extended by Executive Orders that the question itself should be decided.

The amount involved is substantial in area of land involved and at the most conservative valuation of the property rights taken from the Sioux Tribe by the Executive Orders of 1879 and 1884, the amount in dollars is likewise substantial.

The court below in its decision made the following statement:

> "in no instance can we find a statement of what interest, if any, was given to Indian Tribes in lands set apart by Executive Orders for their use where such Indian Tribes had a permanent treaty reservation." (R. 27)

In view of the large number of Executive Orders creating or enlarging Indian reservations it would seem that the statement by the court below is equivalent to a request for a decision on the question of such Executive Orders.

Finally, the petitioner urges that the Executive Orders of 1879 and 1884 were based upon a specious and erroneous assumption, to wit, that the statutes of the United States had been amended in regard to the control of the liquor traffic among Indians; the Court of Claims adopted this specious and erroneous assumption, when in fact the statutes had not been so amended. Thereby the petitioner has been deprived of its property right in the lands restored to the public domain. It has not been paid therefor, and therefore urges that the writ should be granted in order that these several questions and the rights of the petitioner may be determined.

BRIEF.

The question here is whether the Sioux Tribe obtained rights under the Executive Orders of 1875 and 1876 and whether the later orders of 1879 and 1884 took those rights away from the tribe without compensation.

The record shows that a substantial number of Sioux Indians were living in the area east of the Missouri River ceded to the United States by the Sioux Treaty of 1868. These members of the tribe remained in their customary habitat after the Treaty of 1868 was signed. They were offered a hope by the Treaty Commission that the Commissioners would endeavor to secure a change in the reservation boundaries to include the lands east of the Missouri River. Numerous recommendations were made by Indian agents in the Sioux country for the establishment of agencies on the easterly side of the Missouri River to care for the Sioux living in that territory. Without doubt the liquor traffic was a nuisance on the easterly side of the Missouri River.

There were then several reasons for the issuance of the Executive Orders of 1875 and 1876. The Executive Orders, standing alone, created an interest in the Sioux Tribe. These orders cannot be said to spring from one reason, when the record shows other vital reasons existed for the issuance of the orders.

Unquestionably the Sioux Tribe took the use of the land in question by the authority contained in the Executive Orders. A substantial portion of the Tribe was already in actual occupation of the area. The words "for the use of the Sioux Tribe" are the exact words used in the Treaty of 1868, which treaty contemplated additions to the permanent reservation of the Sioux Tribe. No thin distinction between the word "use" and the words "use and occupation" should have been made by the court below. The

term "use and occupation" is a doublet, of which there are many in the law, such as "last will and testament" and many others well known to this Court.

The court below held that the liquor question was the only basis for the issuance of the Executive Orders of 1875 and 1876. Thereafter the court adopted the theory that the restoration to the public domain by the issuance of the subsequent orders of 1879 and 1884 was justified because the statutes relating to the suppression of the liquor traffic had been so amended that the liquor traffic was no longer a menace.

The statutes speak for themselves and are set out in this petition. No change was made in the law so far as white bootleggers were concerned.

The Code Commission of 1873 inserted in Section 2139 the words, "except an Indian in the Indian country" which gave no special privileges to whites but only to an Indian in the Indian country. At no time has any one suggested, as the record will show, that the Indians were engaged in the sale of liquor. At all times the white bootleggers could have been prosecuted under the statute. The error of the Code Commission, of course, was stupid and apparently was incorporated in the code of 1873 carelessly, like hundreds of other errors in that code. The correction by the Act of February 27, 1877 (19 Stat. 244), simply eliminated from the section the words "except an Indian in the Indian country". At all times there was ample statutory authority for the suppression of the liquor traffic.

The real reason for the issuance of the orders restoring the land to the public domain in 1879 and 1884 was that white citizens wanted these lands for settlement.

The defendant below questioned the power of the Executive to issue the Executive Orders of 1875 and 1876. Our question here is not restricted to the power of the Executive but contains a further question, that is, whether the act of

the President, had he the power or not, set up property rights in these innocent third parties to the transaction.

We believe that the power of the President cannot now be questioned. Section 27 of the Act of June 30, 1919 (41 Stat. p. 3) prohibited the President from the further exercise of this identical power, that is, creating or enlarging Indian reservations by Executive Order. The Congress might have passed, but did not pass, such an act at any time from and after the assumption of the power by the President in the period just after the war between the States.

The Congress holds and exercises the delegated sovereignty of the people of these United States. As such, and under the Constitution, the Congress has control over the public lands. The Congress, however, from 1870 to 1919 acquiesced in the issuance of Executive Orders concerning Indian reservations and we insist that when the Congress terminated the practice of the Executive by the Act of June 30, 1919 (*supra*) without repealing or questioning any Executive Orders issued prior thereto, that the Congress, itself, ratified and confirmed all such previous Executive Orders.

Summary.

If the President had the power to issue the orders, the orders certainly set up property rights in the Sioux Tribe.

If the action of the President was beyond his authority, still it set up rights in the innocent third parties to the transaction.[2]

If the President exceeded his power and the Congress acquiesced therein over a long period of time then, as was held in *United States* v. *Midwest Oil Co.* (236 U. S. 459), the acquiescence amounts to ratification.

[2] In similar circumstances the *ultra vires* act of an officer or directors of a corporation which sets up rights in innocent third parties cannot be relied upon to destroy the rights, although the officer or directors may be held personally responsible for the act.

If the President exceeded his power and the Congress acquiesced and thereafter the Congress terminated the power without questioning its long continued use, then the Congress has affirmatively ratified those Executive Orders issued prior to the termination of the Executive practice (Act of June 30, 1919 (*supra*)).

Conclusion.

We submit that this case should be reviewed; that the legal effect of Executive Orders issued prior to June 30, 1919, creating or enlarging Indian Reservations should be determined; that not only the rights of these petitioners but the rights of other Indian tribes equally involved should be determined.

We submit that the Sioux Tribe had a property right in the lands east of the Missouri River, that it was taken from them, and that the tribe is entitled to a decision by this Court holding that tribe entitled to just compensation for the taking of its property.

RALPH H. CASE,
Attorney for Petitioner,
Southern Building,
Washington, D. C.

Of Counsel:
JAMES S. Y. IVINS,
RICHARD B. BARKER.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1941.

No. 798.

THE SIOUX TRIBE OF INDIANS, PETITIONER,

v.

THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR THE SIOUX TRIBE OF INDIANS, Petitioner.

RALPH H. CASE,
Attorney of Record,
Southern Building,
Washington, D. C.

Of Counsel:
JAMES S. Y. IVINS,
RICHARD B. BARKER.

THE McQUEEN PRESS

INDEX

Subject Index.

	PAGE
OPINION BELOW	1
JURISDICTION	1
STATEMENT	1
Status Involved	3
Questions Presented	9
SPECIFICATIONS OF ERROR TO BE URGED	10
SUMMARY OF BRIEF	13
BRIEF	14
1. The President had Power to Issue the Executive Orders	14
2. The Executive Orders were Issued with No Limitation or Reserved Power to Revoke	17
3. The Sioux Tribe was in Actual Occupation of the Lands, the "Use" of which was Granted by the Executive Orders	20
4. There were Various Reasons for the Issuance of the Executive Orders	22
5. There was No Change in the Law Prohibiting Sale of Liquor to Indians by White Citizens	24
6. The Reason for the Restoration of the Lands to the Public Domain was the Desire of White Citizens to Obtain Petitioner's Lands	26
7. The Executive Orders of 1879 and 1884 Took from Petitioner the Right to Use and Occupy its Lands	27
8. The Taking of Petitioner's Lands was in the Exercise of the Right of Eminent Domain, for which Petitioner is Entitled to Just Compensation	27
CONCLUSION	33

Cases Cited.

	PAGE
Mason *v.* United States, 260 U. S. 545	16
Seaboard Air Line *v.* United States, 261 U. S. 299	28, 29
Shoshone Tribe of Indians *v.* United States, 299 U. S. 476	29
Spalding *v.* Chandler, 160 U. S. 394	28, 32
United States *v.* Klamath and Moadoc Tribe of Indians, 304 U. S. 119	30
United States *v.* Midwest Oil Co., 236 U. S. 459	32
United States *v.* Santa Fe Railroad Co. (Adv. Ops. No. 3, October Term, 1941, L. ed. 86, p. 220)	31

Statutes Cited.

Act of June 3, 1920, 41 Stat. 728	3
Act of February 13, 1862, 12 Stat. 339	8, 24
Act of February 27, 1877, 19 Stat. 244	8, 24
Act of June 30, 1919, 41 Stat. 3–34	17
General Allotment Act of February 8, 1887, 24 Stat. 388	16, 17, 32
Treaty of April 29, 1868, 15 Stat. 635	4, 18, 21
Revised Stats. 1873, Act of June 22, 1874, 18 Stat. Vol. 1, 113	8, 24
Revised Stats. 1878, 2d Ed., Sec. 2139, p. 373	9

Executive Orders.

January 11, 1875, Kappler, Vol. 1, 898	5, 18
March 16, 1875, Kappler, Vol. 1, 884	5, 18
May 20, 1875, Kappler, Vol. 1, 898	5, 6, 18
November 28, 1876, Kappler, Vol. 1, 884	6, 18
August 9, 1879, Kappler, Vol. 1, 889	6, 7
January 24, 1882, Kappler, Vol. 1, 864	19
January 4, 1883, Kappler, Vol. 1, 804	31
March 20, 1884, Kappler, Vol. 1, 884	7

Report, Commissioner of Indian Affairs, 1878, pp. 20–22	23

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1941.

No. 798.

THE SIOUX TRIBE OF INDIANS, PETITIONER,
v.
THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR THE SIOUX TRIBE OF INDIANS, Petitioner.

OPINION BELOW.

The opinion of the Court of Claims is not yet reported.

JURISDICTION.

The judgment of the Court of Claims, to be reviewed, was entered April 7, 1941 (R. 30). Motion for new trial was denied October 6, 1941 (R. 30–31). The petition for writ of certiorari was filed December 12, 1941; granted February 9, 1942. The jurisdiction of the Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

STATEMENT.

The petitioner comprises those Indians or their descendants of the Sioux Tribe who were parties to the Treaty of April 29, 1868 (15 Stat. 635). That treaty set apart a permanent reservation for the Sioux Tribe, the easterly boundary of which was the east bank of the Missouri River, but

including two small reservations on the east bank of the river (now the Crow Creek Reservation).

The treaty further provided for the cession of all lands east of the Missouri River to the United States, except Crow Creek Reservation.

The proposed treaty included the bands of the Sioux Tribe living on the east side of the Missouri River. These were the Upper Yanktonai and the Lower Yanktonai bands of Sioux Indians. They objected to the terms of the treaty but signed when they were assured by the Treaty Commissioners that an effort would be made to extend the permanent reservation so as to include the James River country east of the Missouri River. The Yanktonai bands, however, did not move onto the permanent reservation but remained in the area east of the Missouri River.

By three Executive Orders in 1875 and one in 1876 (R. 9–14) lands on the easterly side of the Missouri River were "withdrawn from sale and set apart for the use of the several tribes of the Sioux Indians as an addition to their present reservation in said territory" (Dakota). The Yanktonai bands, in common with the other bands of the Sioux Tribe, continued to use and occupy the territory east of the Missouri River covered by the Executive Orders.

In 1879 and in 1884, by Executive Orders (R. 16, 18), all of the land added by the previous Executive Orders was restored to the public domain. The Sioux Indians living on the east side of the Missouri River were moved to the west side of the Missouri River except a small number of the Lower Yanktonai band, which was removed to the Crow Creek Indian Reservation.

The petitioner claims that the Executive Orders of 1875 and 1876 gave the Sioux Tribe the same right to the lands added to the permanent reservation as the Treaty of 1868 granted to the Sioux Tribe in the permanent reservation. The Sioux Tribe was never consulted in regard to the orders restoring these lands to the public domain. The tribe has never received compensation in any form or in any amount for the property right in the lands which were taken from them by the Executive Orders of 1879 and 1884. The area involved is 5,667,016.74 acres (R. 5).

Status Involved.

The material provisions of the Jurisdictional Act under which this cause of action is brought are as follows (Act of June 3, 1920, 41 Stat. 728):

> "That all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said tribe from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon.
>
> "Sec. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding lapse of time or statutes of limitations, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums heretofore paid or expended for the benefit of said tribe or any band thereof. The claim or claims of the tribe or band or bands thereof may be presented separately or jointly by petition, subject, however, to amendment, suit to be filed within five years after the passage of this Act; and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant, and any band or bands of said tribe or any other tribe or band of Indians the court may deem necessary to a final determination of such suit or suits may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys, employed by said Sioux Tribe or any bands thereof, shall set forth all the facts on which the claims for recovery are based, and said petition shall be signed by the attorney or attorneys employed, and no other verification shall be necessary. Official letters, papers, documents, and public

records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said tribe or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said tribe or bands of Indians." (R. 2-3.)

The material provisions of the Treaty of April 29, 1868 (15 Stat. 635) are as follows:

"Article 2: The United States agrees that the following district of country, to wit, viz. commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided."

"Article 12. No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by

the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in article 6 of this treaty."

The material provisions of the Executive Orders adding lands to the permanent reservation of the Sioux Tribe are as follows:

"Commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same; thence east with said parallel of latitude to the ninety-ninth degree of west longitude; thence south with said degree of longitude to the east bank of the Missouri River; thence up and with the east bank of said river to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians, as an addition to their present reservation in said Territory."

(January 11, 1875. Kappler, Vol. 1, 898.)

"Commencing at a point where the one hundred and second degree of west longitude intersects the forty-sixth parallel of north latitude; thence north on said one hundred and second degree of longitude to the south bank of the Cannon Ball River; thence down and with the south bank of said river to a point on the east side of the Missouri River opposite the mouth of said Cannon Ball River; thence down and with the east bank of the Missouri River to the mouth of Beaver River; thence up and with the south bank of Beaver River to the one hundredth degree of west longitude; thence south with said one hundredth degree of longitude to the forty-sixth parallel of latitude; thence west with said parallel of latitude to the place of beginning, be and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians, as an addition to their present reservation in said Territory."

(March 16, 1875. Kappler, Vol. 1, 884.)

"It is hereby ordered that that portion of the public domain in the Territory of Dakota lying south of an east and west line from the northwest corner of the Yankton Indian Reservation to the ninety-ninth degree of longitude, and between said longitude and the Missouri River on the west and the Yankton Indian Reservation on the east,

be, and the same hereby is, withdrawn from sale and settlement, and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said territory."

(May 20, 1875. Kappler, Vol. 1, 898.)

"Commencing at a point on the south bank of Beaver River, intersected by the one hundredth degree of west longitude; thence in a direct line to the east corner of the Fort Rice Military Reservation; thence in a southwestern direction along the said military reservation to the east bank of the Missouri River; thence with the east bank of the Missouri to the mouth of Beaver River; thence up and with the south bank of Beaver River to the place of beginning, be, and the same hereby is withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory."

(November 28, 1876. Kappler, Vol. 1, 884.)

The material provisions of the Executive Orders restoring to the public domain the land last above described are as follows:

"It is hereby ordered that all that portion of the Sioux Indian Reservation in Dakota Territory created by Executive orders dated January 11, March 16, and May 20, 1875, and November 28, 1876, lying within the following-described boundaries, viz: Beginning at a point where the west line of the Fort Randall Military Reservation crosses the Missouri River; thence up and along said river to the mouth of American Creek; thence up and along said creek to the ninety-ninth degree of west longitude; thence south along said degree to a point due west from the northwest corner of the Yankton Indian Reservation; thence due east to the northwest corner of said reservation; thence due south to the north boundary line of Fort Randall Military Reservation; thence following said boundary line northwesterly to the northwest corner of said military reservation; thence south on the west boundary line of said reservation to the place of beginning. And also the following-described land: Beginning at the east bank of the Missouri River at the mouth of Medicine Knoll Creek; thence up and along the Missouri River to the boundary line of Fort Sully Military Reserva-

tion; thence northeasterly along said boundary line to the southeast corner of said military reservation; thence northwesterly along the boundary line of said reservation to the northeast corner thereof; thence due north to the east bank of the Missouri River; thence up and along the east bank of said river to the mouth of the Bois Cache; thence due north to the east bank of said river to the south line of township 129 north; thence east along said township line to the line between ranges 78 and 79 west; thence north along said range line to Beaver Creek, or the north boundary line of the reservation set aside by Executive order of March 16, 1875; thence west along said creek to the east bank of the Missouri River; thence up and along said east bank to the southeast corner of Fort Rice Military Reservation; thence northeasterly along said military reservation to the east corner of said reservation; thence in a direct line to a point on the south bank of Beaver Creek where said creek is intersected by the one hundredth degree of west longitude; thence south with said one hundredth degree of longitude to the forty-sixth parallel of north latitude; thence east with said parallel of latitude to the ninety-ninth degree of west longitude; thence south with said degree of longitude to its intersection with the north boundary line of the old Sioux or Crow Creek Reservation; thence west along the north boundary line of said reservation to the eastern boundary line of the old Winnebago Reservation; thence north along said east line to the northeast corner of said Winnebago Reservation; thence west along the north boundary line of said reservation to the middle channel of Medicine Knoll Creek; thence down the middle channel of said creek to the place of beginning, be, and the same hereby is, restored to the public domain."

(August 9, 1879. Kappler, Vol. 1, 889.)

"It is hereby ordered that the lands embraced within the three existing Executive additions to the Great Sioux Reservation, in Dakota, east of the Missouri River, viz, the one opposite the Standing Rock Agency, the one opposite the mouth of Grand River and the site of the old Grand River Agency, and the one opposite the mouth of Big Cheyenne River and the Cheyenne River Agency, be, and the same are hereby, restored to the mass of the public domain, the same being no longer needed for the purpose for which they were withdrawn from sale and settlement."

March 20, 1884. Kappler, Vol. 1, 884.)

The material provisions of the statutes governing the sale of liquor to Indians and the introduction of liquor into the Indian country are as follows:

"That if any person shall sell, exchange, give, barter, or dispose of any spirituous liquor or wine to any Indian under the charge of any Indian superintendent or Indian agent appointed by the United States, or shall introduce or attempt to introduce any spirituous liquor or wine into the Indian country, such person, on conviction thereof before the proper district court of the United States, shall be imprisoned for a period not exceeding two years, and shall be fined not more than three hundred dollars: PROVIDED, HOWEVER, That it shall be sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country, if it be proved to be done by order of the War Department or of any officer duly authorized thereto by the War Department."

(Act of February 13, 1862. 12 Stat. 339.)

"Sec. 2139. No ardent spirits shall be introduced under any pretense, into the Indian country. Every person, except an Indian, in the Indian country, who sells, exchanges, gives, barters, or disposes of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or agent, or introduces or attempts to introduce any spirituous liquor or wine into the Indian country, shall be punishable by imprisonment for not more than two years, and by a fine of not more than three hundred dollars. But it shall be a sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country, that the acts charged were done by order of or under authority from the War Department, or any officer duly authorized thereunder by the War Department."

(United States Revised Stats. 1873, Act of June 22, 1874. 18 Stat. Vol. 1, 113.)

"Section twenty one hundred and thirty nine is amended by striking out, in lines two and three, the words 'except an Indian in the Indian country.'"

(Act of February 27, 1877, 19 Stat. 244.)

AN ACT

To Revise and Consolidate the Statutes of the United States, in Force on the First Day of December, anno Domini, One Thousand Eight Hundred and Seventy-three.

"Sec. 2139. No ardent spirits shall be introduced, under any pretense, into the Indian country. Every person [except an Indian, in the Indian country][1] who sells, exchanges, gives, barters, or disposes of any spirituous liquors or wine to any Indian under the charge of any superintendent, or agent, or introduces or attempts to introduce any spirituous liquor or wine into the Indian country, shall be punishable by imprisonment for not more than two years, and by a fine of not more than three hundred dollars. But it shall be a sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country, that the acts charged were done by order of or under authority from the War Department, or any officer duly authorized thereunto by the War Department."

(United States Revised Statutes, 2nd Ed., 1878, p. 373.)

Questions Presented.

1. Whether the Sioux Tribe of Indians by virtue of the Executive Orders of January 11, 1875, March 16, 1875, May 20, 1875, and November 28, 1876, obtained title to and a vested interest in the lands by said orders added to the permanent reservation created by the Treaty of April 29, 1868 (15 Stat 635), such that said title and interest could not be taken from the Sioux Tribe without payment of just compensation.

2. Whether the Executive Orders of August 9, 1879, and of March 20, 1884, restoring to the public domain the area previously set apart for the use of the Sioux Tribe, and attached to as a part of the permanent reservation of said tribe, is such a taking of private property for public use as to require the payment of just compensation under the Constitution.

[1] Note: The words shown in brackets are in italics. "The portions of the statutes repealed are printed in italics and included in brackets." Geo. S. Boutwell, Commissioner. (U. S. R. S., 2nd Ed., 1878, p. 5.)

3. Whether an Executive Order withdrawing from the public lands a specified area and attaching such area to an existing Indian treaty reservation, in terms conforming to the terms of a treaty providing for such addition, vests in the Indian tribes such an interest in the lands covered by the Executive Order that the Indian Tribe can not be divested of such interest without payment of just compensation.

4. Whether the Congress, by the Act of June 30, 1919, which expressly prohibited the creation of, or additions to, Indian reservations by Executive Order from and after the date of the act, so recognized the prior Executive practice and so acquiesced in the issuance of all previous Executive Orders similar to those prohibited by the act as to validate all such previous orders, especially in view of the fact that the Act of June 30, 1919, did not revoke nor question such Executive Orders issued prior to that date.

5. Whether the plain and unambiguous terms of a grant are subject to the undisclosed purposes of the grantor and thereby subject the grant to revocation at will by the grantor, even though it is shown that the reason for the revocation did not in fact exist at the time of revocation.

SPECIFICATIONS OF ERROR TO BE URGED.

1. The court erred in holding that the Sioux Tribe did not obtain by the Executive Orders any interest for which the United States are responsible, either in law or in equity in the following holding:

> "The Sioux Nation did not get by these four Executive Orders, adding land to their permanent reservation, any interest for which the Government is responsible either in law or in equity." (R. 28.)

2. The court erred in construing the words of the Treaty of April 29, 1868 (*supra*) in the following holding:

> "The use of the words in the treaty 'or in such territory as may be added to this reservation for the use of said Indians' clearly intended such lands which may be added

thereto, either by treaty, which was the sole way by which Congress dealt with these Indian Tribes up to 1871, or by act of Congress after 1871. Congress did not intend by these words to vest in the President the fee to the public domain, or the power to dispose of the title to it, a power which was, under the Constitution, in the Congress alone." (R. 27.)

3. The court erred in holding that Congressional ratification by a specific act of Congress was necessary to give full effect to the Executive Orders here in question in the following holding:

"It would have required some act of Congress by prior legislation, or subsequent ratification of the Executive Orders, in order to divest the United States of its title to the land and place it elsewhere." (R. 27.)

4. The court erred in holding that the additions to the Sioux Reservation made by the Executive Orders was "of a temporary nature," in the following holding:

"In the case before us, although the Executive Orders did not contain words of a temporary nature, nevertheless, the recommendation of the Commissioner of Indian Affairs to the Secretary of the Interior, on which these Executive Orders were based, showed that the additions were solely for the purpose of regulating the liquor traffic on the Missouri River and the protection of these Indians on their permanent reservation from the injurious and harmful effects of such traffic." (R. 27.)

5. The court erred by taking into consideration the several errors heretofore set out and by process of adding error to error, reaching the conclusion that the undisclosed intent of the United States left with the United States the power to revoke the Executive Orders of 1875 and 1876 and that the several Executive Orders were temporary in their nature and could be withdrawn at any time, in the following holding:

"Taking all these matters into consideration, it seems clear that in issuing the Executive Orders of 1875 and 1876, which added some six million and odd acres to the

Sioux treaty reservation, it was intended as a temporary expedient in order to protect the Indians from the injurious and nefarious liquor traffic, and the orders were temporary in their nature and could be withdrawn at any time and were withdrawn in 1879 and 1884." (R. 30.)

6. The court below erred in three instances in making a distinction between the expression "use" contained in the Executive Orders and the words "use and occupation," as set out in the following holdings:

"In these four Executive Orders there is the expression 'use' of the several tribes and not the words 'use and occupation' or 'use or occupation' as expressed in the treaty." (R. 23.)

"The actual fee is always in the United States but the use of the terms 'use and occupation,' 'use or occupation,' or 'occupation' carry such an equitable title in the Indians that the Congress of the United States has always recognized that compensation should be given the Indians for the lands when they are taken." (R. 24.)

"In the instant case the Executive Orders of 1875 and 1876 were withdrawn in 1879 and 1884. For over sixty years the Sioux Indians have not had the use of these lands and even during the periods from 1875 to 1879 and 1884 they had only the use which permitted hunting of buffalo and other game." (R. 29.)

7. The court erred in relying upon the statement made by the Commissioner of Indian Affairs to the effect that the Act of February 27, 1877 (19 Stat. 244), amended the United States code of 1873 in respect to the suppression of the liquor traffic in the Indian country, as set out in the following:

"In 1879, the Secretary of the Interior, who had been advised by the Commissioner of Indian Affairs, recommended that the lands, with certain exceptions, so withdrawn from settlement and sale under the four orders above mentioned, could be restored to the public domain and the liquor traffic with the Indians suppressed, under the act of February 27, 1879 (Stat. 244)." (R. 23.)

SUMMARY OF BRIEF.

The contentions of the petitioner in this brief may be summarized as follows:

1. The President had the power to issue the Executive Orders of 1875 and 1876 adding lands to the permanent Sioux Reservation as a part thereof.

2. The Executive Orders were issued in conformity with the Sioux Treaty of April 29, 1868, with no limitation as to term or tenure nor power reserved by the Executive to revoke or rescind the Executive Orders.

3. The petitioner was in actual occupation of the lands covered by the Executive Orders at and before the issuance thereof and by those orders the "use" of the lands therein described was granted to petitioner. Petitioner thereafter enjoyed the use and the occupation of the lands. No distinction can be made between "use" and "use and occupation."

4. There were various reasons for the issuance of the Executive Orders, none of which are referred to in the orders themselves.

5. If the sale of liquor was one, but not the only reason for the issuance of the Executive Orders, then that reason was founded on a misconstruction of the law prohibiting the sale of liquor to Indians. There was no change in the law respecting introduction of liquor into the Indian country or the sale of liquor to Indians which justified the issuance of the Executive Orders of 1879 and 1884 restoring the lands to the public domain.

6. The actual reason for restoring the lands to the public domain was the desire of white citizens to file homestead or other entries on the lands reserved to petitioner.

7. The Executive Orders of 1879 and 1884 took from petitioner the right to use and to occupy the lands previously reserved.

8. The taking by those orders was such a taking of private property by the United States as to require the payment of just compensation to the petitioner.

BRIEF.

1. The President had Power to Issue the Executive Orders.

Petitioner contends that the President had the power to issue the several Executive Orders here involved (January 11, 1875, March 16, 1875, May 20, 1875, November 28, 1876, R. 9, 11, 12, 13, 14). That upon the issuance of these orders the petitioner had the interest in the lands set over to petitioner by the terms of the orders.

That the President had authority at the date of the four foregoing orders to withdraw these lands and set them apart for the benefit of the Sioux Indians is settled beyond the possibility of controversy.

In *United States* v. *Midwest Oil Co.*, 236 U. S. 459, the Supreme Court had before it this same question of the power of the President to withdraw public lands from entry, which otherwise were open to entry, and to devote the lands so withdrawn to another public use. The question was not on the particular purpose of the President nor on the particular use intended by the withdrawal, but the question was on the power of the President to withdraw the lands from entry. On this question the Court said:

At page 469:

> "1. We need not consider whether, as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase. The case can be determined on other grounds and in the light of the legal consequences flowing from a long-continued practice to make orders like the one here involved. For the President's proclamation of September 27, 1909, is by no means the first instance in which the Executive, by a special order, has withdrawn lands which Congress, by general statute, had thrown open to acquisition by citizens. And while it is not known when the first of these orders was made, it is certain that 'the practice dates from an early period in the history of the government.' *Grisar* v. *McDowell*, 6 Wall. 381, 18 L. ed. 868. Scores and hundreds of these

orders have been made; and treating them as they must be (*Wolsey* v. *Chapman*, 101 U. S. 769, 25 L. ed. 920), as the act of the President, an examination of official publications will show that (excluding those made by virtue of special congressional action, *Donnelly* v. *United States*, 228 U. S. 255, 57 L. ed. 825, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913E, 710), he has, during the past eighty years, without express statutory,—but under the claim of power so to do,—made a multitude of Executive orders which operated to withdraw public land that would otherwise have been open to private acquisition. They affected every kind of land—mineral and non-mineral. The size of the tracts varied from a few square rods to many square miles, and the amount withdrawn has aggregated millions of acres. The number of such instances can not, of course, be accurately given, but the extent of the practice can best be appreciated by a consideration of what is believed to be a correct enumeration of such Executive Orders mentioned in public documents.

They show that prior to the year 1910 there have been issued

99 Executive orders establishing or enlarging Indian reservations;

109 Executive orders establishing or enlarging military reservations and setting apart land for water, timber, fuel, hay, signal stations, target ranges and rights of way for use in connection with military reservations;

44 Executive orders establishing bird reserves.

"In the sense that these lands may have been intended for public use, they were reserved for a public purpose. But they were not reserved in pursuance of law, or by virtue of any general or special statutory authority. For it is to be specially noted that there was no act of Congress providing for bird reserves or for these Indian reservations. There was no law for the establishment of these military reservations or defining their size or location. There was no statute empowering the President to withdraw any of these lands from settlement, or to reserve them for any of the purposes indicated.

"But when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain, nothing was more natural than to retain what the government already owned. And in making such

orders, which were thus useful to the public, no private interest was injured. For, prior to the initiation of some right given by law, the citizen had no enforceable interest in the public statute, and no private right in land which was the property of the people. The President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen, and being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large. Congress did not repudiate the power claimed or the withdrawal orders made. On the contrary, it uniformly and repeatedly acquiesced in the practice, and, as shown by these records, there had been, prior to 1910, at least 252 Executive Orders making reservations for useful, though nonstatutory, purposes."

(*United States* v. *Midwest Oil Co.*, 236 U. S. 459.)

Much more might be quoted from the decision in *United States* v. *Midwest Oil Co.* In fact the entire decision is squarely upon the point of the power of the Executive to withdraw public lands from entry. The decision is cited as controlling in *Mason* v. *United States* (260 U. S. 545). In the latter case the Court held:

"Whatever legitimate doubts existed at the time of the locations respecting the validity of the executive order were resolved by the subsequent decision of this court in *United States* v. *Midwest Oil Co.* 236 U. S. 459, 59 L. ed. 673, 35 Sup. Ct. Rep. 309, where it was held that a similar order, issued in 1909, was within the power of the Executive. Upon the authority of that case the order here in question must be held valid."

(*Mason* v. *United States*, 260 U. S. 545, 553.)

The general allotment act of February 8, 1887 (24 Stat. 388, Sec. 1) contains the following provision:

"That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his

opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:"

(Act February 8, 1887, 24 Stat. 388.)

The general allotment act ratified and confirmed Executive Orders creating Indian reservations which were in effect on the date of the act, February 8, 1887.

If the lands involved in this case had not been restored to the public domain by the Executive Orders of 1879 and 1884 (R. 16, 17, 18) the provisions of the general allotment act would have applied to these lands and the lands would have been alloted to members of the Sioux Tribe.

It is submitted that the President had the power to issue the Executive Orders here in question and that the orders were effective. The effect of the orders was to vest[1] in the Sioux Tribe, petitioner herein, the right to the use of the lands described in the Executive Orders.

2. The Executive Orders were Issued with No Limitation or Reserved Power to Revoke.

Petitioner contends that the Executive Orders of 1875, 1876 were in fact issued as they appear in this record (R. 9, 11, 12, 13, 14). The Executive Orders speak for themselves.

Following the description of the land in each Executive

---

[1] The Court below held that the Executive Orders attaching lands to the Sioux permanent reservation were not effective to divest the United States of any portion of its title unless ratified by some act of Congress. We submit the ratification by a special act was unnecessary in view of the argument presented previously in this brief. However, attention is invited to a subsequent act of Congress, Section 27 of the Act of January 30, 1919 (41 Stat. 3-34). This act prohibited the creation of new Indian reservations by Executive Order.

This act recognizes the long continued practice by the Executive of the creation of new or the extension of existing Indian reservations. The act does not denounce the practice but leaves all previous Executive Orders unaffected. The act is a recognition of the practice and by the stoppage of the practice is in effect a validation of the practice so long as it was continued and prior to the date of the act.

Order are the vital words of withdrawal from sale and conveyance. In the four orders those words are as follows:

January 11, 1875 (R. 9).

"be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory."

March 16, 1875 (R. 11).

"be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory."

May 20, 1875 (R. 12).

"be, and the same hereby is, withdrawn from sale and settlement and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory."

November 28, 1876 (R. 13, 14).

"be and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory."

The effect of these orders was to convey and deliver to the Sioux Indians the "use" of the lands described in the four Executive Orders.

The orders contain no words of limitation. The absence of words of limitation can not be supplied.

Article 2 of the Treaty of April 29, 1868 (15 Stat. 635; R. 4-5) provided for the addition of lands to the permanent Sioux reservation created by that treaty in the following words:

"* * * and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon or reside in the territory described in this article, *or in such*

*territory as may be added to this reservation for the use of said Indians. * * * "* (Emphasis supplied.)

It is worthy of note that the Executive Orders of 1875–1876 (*supra*) contain the word "use," which is the word employed in Article 2 of the treaty last quoted.

Had the use granted to the petitioner been of a limited nature or for a specific purpose, then the Executive Orders could and should have so recited. Where in another situation it was found necessary to withdraw from settlement and entry an area of land and attach that area to this same, identical permanent reservation, the Executive Order specifically limits the duration of the addition. That Executive Order is as follows:

"Executive Mansion,
January 24, 1882.

"It is hereby ordered that the following-described tract of country in the State of Nebraska, viz: Beginning at a point on the boundary line between the State of Nebraska and the Territory of Dakota, where the range line between ranges 44 and 45 west of the sixth principal meridian, in the Territory of Dakota, intersects said boundary line; thence east along said boundary line 5 miles; thence due south 5 miles; thence due west 10 miles; thence due north to said boundary line; thence due east along said boundary line to the place of beginning, be, and the same is hereby, withdrawn from sale and set aside as an addition to the present Sioux Indian Reservation in the Territory of Dakota.

"*This order of reservation to continue during the pleasure of the President.* CHESTER A. ARTHUR."

(Kappler, Vol. I, p. 864–865.) (Emphasis supplied.)

Here was a clear case of an addition made for a specific purpose and the addition is limited by the wording of the Executive Order. No complaint has been made by the petitioner herein in connection with this land attached to the south side of the Sioux permanent reservation; no claim has been asserted for the subsequent restoration of this land to the public domain. The issuance of this last named Executive

Order clearly shows that the Executive and those acting under his direction knew full well how to draw an Executive Order containing a limitation. It shows that if the situation was as has been held by the Court below, and if the Executive Orders here in question were issued for a special purpose or for a limited time, then the Executive Orders of 1875–1876 (*supra*) must have so recited, which they do not.

It is submitted that the Executive Orders of 1875–1876 (*supra*), were issued in conformity with the Sioux Treaty of April 29, 1868 (*supra*); that the orders contain no limitation as to the term or tenure, nor is there any reservation of power in the Executive to revoke or rescind the Executive Orders here involved.

3. The Sioux Tribe was in Actual Occupation of the Lands, the "Use" of which was Granted by the Executive Orders.

Petitioner contends that the Sioux Tribe actually occupied the lands attached to the Sioux permanent reservation by the Executive Orders of 1875–1876 (*supra*). That said lands were so occupied prior to the making of the Treaty of April 29, 1868 (*supra*); such occupancy was continuous thereafter, including the entire period 1875 to 1879–1884, i.e. the period when the Executive Orders here involved were in force, all with the consent of the United States.

The record in this case establishes the fact that a substantial number of members of the Sioux Tribe belonging to the Upper and Lower Yanktonai Bands occupied a portion of Dakota Territory east of the Missouri River prior to the negotiation and signing of the Treaty of April 29, 1868 (*supra*). (R. 32.)

In 1873 the agent at Grand River Agency reported that the Lower Yanktonai were in camp "on the other side of the river, opposite the agency." (R. p. 32.) John Burke, the agent at Standing Rock Agency, in 1875 reported the building of a ferry boat for dispatch of agency business requiring attention on the east side of the Missouri River. (R. p. 33.) The same agent, John Burke, in 1876, at Standing Rock Agency reported that "the Lower Yanktonai have sixteen of their little

farming settlements on the east side of the Missouri River." (R. p. 33.)

Reference is made to specification of error (*ante*, p. 12). This error by the Court below consists of the holding that there is a distinction between the word "use" as employed in the Executive Orders here in question and the term frequently employed in relation to Indian lands, i.e. "use and occupation."

This is a distinction without a difference. It is submitted it was error for the Court below to make the distinction and to rely upon it. The Court below evidently concluded that the petitioner obtained something less than use and occupation for the reason that the Executive Orders say that the lands are "set apart for the *use* of the several tribes of the Sioux Indians as an addition to their present reservation in said Territory." (Art. 2, Treaty April 29, 1868, *supra.*)

The record herein shows that these same Indians, the Yanktonai bands, living on the east side of the Missouri River, were urged to rely upon the good offices of the treaty commissioners for the extension of the permanent reservation eastward from the Missouri River and including the home lands of these same Yanktonai bands. (R. 32.)

So long as some portion of the Sioux Indians remained in occupation of the lands east of the Missouri River it was not necessary to confer upon them a separate right of occupancy. This they already had. In view of the cession contained in the Treaty of April 29, 1868, it was necessary to confer upon the Yanktonai bands and the other Sioux bands the right of "use."

In its ordinary and accepted meaning the "use" of lands necessarily includes the right to go in and on and hence to "occupy" the lands. No use could be made of lands if the party having the right to use the lands could not go upon them. The term "use and occupation" adds nothing to the term "use," nor does it take anything away from it. These words, that is either "use" or "use and occupation" are not to be regarded in a technical sense and should not have been construed on the strictly technical basis adopted by the court below. It is established by the decisions of the courts beyond the necessity of citations that strict technical rules shall not

be used against uninformed, dependent people, particularly the Indian tribes.

So long as the petitioners, or part of them, had a physical occupation of the lands at the time of the issuance of the Executive Orders here in question, the grant of the "use" of the lands by the Executive Orders of 1875 and 1876 (*supra*) effected a joinder of "use" and "occupation."

It is submitted that the physical occupation of the lands here in question, together with the "use" granted by the Executive Orders effected a joinder of title in petitioner.

It is further submitted the Court below should not have recited and relied upon the distinction between the word "use" and the words "use and occupation."

4. There were Various Reasons for the Issuance of the Executive Orders.

Petitioner contends there were various reasons for the issuance of the Executive Orders here in question, which reasons are shown by the record in this case.

As set out in the last preceding section of this brief, the Sioux Tribe, or bands thereof, were in physical occupation of the lands east of the Missouri River prior to the execution of the Sioux Treaty of April 29, 1868 (*supra*) and continuously occupied that area down to 1879-1884. Routine agency business was transacted across the River,—something of a task in those days.

The Yanktonai bands, in particular, remained on and cultivated a portion of their home land on the easterly side of the Missouri River. (R. 32, 33.)

It also appears from the record that liquor vendors and other subversive elements took advantage of the terms of the Treaty of April 29, 1868, to set up shop on the eastern bank of the Missouri River, actually among the Yanktonai bands of the Sioux Tribe, there resident. (R. 37, 38, 39.)

The record shows that

Acting Agent Theodore Schwan at Cheyenne River Agency in 1878 made the following recommendation:

"The great majority live in five villages on the west

side of the Missouri River, three of which are above and two below the agency; only about one-seventh of the entire number, the most progressive, are settled at Peoria Bottom, on the east side, 15 miles below Fort Sully. * * *

"It is generally believed that these Indians would do better if they and their agency were transferred to the east side of the Missouri River, where a part of their number are already located. While for grazing purposes there is probably but little difference in the relative value of the land on the two sides of the river, for agriculture the section on the east side of and bordering the river is in every respect preferable to that on this (the west) side. The soil is more fertile; there is less alkaline matter in it. The area of tillable land is much greater, and generally the shelter afforded on the eastern side is more extensive and easy of access than that of the bluffs opposite."

(Rept. Comr. Ind. Aff. 1878, pp. 20–22.) (R. 34.)

So it appears from the record that the Yanktonai Band of Sioux Indians continued to live on the east side of the Missouri River after the making of the Treaty of 1868 and were living there with the consent of the United States at the time the Executive Orders here involved were issued, and until the Executive Orders of 1879, 1884 were issued. It also appears that the Commissioners who negotiated the Treaty of April 29, 1868 (*supra*) promised to do what they could to have the permanent reservation extended east of the Missouri River. (R. 32.) It also appears from the record that recommendation was made for the establishment of an agency on the east side of the Missouri River for the benefit of the Indians living there. It also appears that the liquor vendors were present and constituted a nuisance on the east bank of the river.

The Executive Orders, however, are clear and specific in making lands here in question a part of the permanent reservation of petitioner. There is no reference to the suppression of the liquor traffic, nor is there any reference to the actual occupation of the area by the Yanktonai Bands of the Sioux Tribe, nor is there any reference to the recommendation made for the establishment of an agency for these Indians on the east side of the Missouri River.

Where more than one purpose has been shown and where the written instrument conveying the use of the land is silent, neither the grantor nor the grantee can say that any one cause or any one recommendation is the one and only cause for the issuance of the conveyance.

On the foregoing it is submitted that there were various reasons for the issuance of the Executive Orders and that the suppression of the liquor traffic was not the sole and only purpose.

5. There was No Change in the Law Prohibiting Sale of Liquor to Indians by White Citizens.

Petitioner contends that if the sale of liquor along the eastern bank of the Missouri River was regarded as one (but not the only one) of the reasons for the issuance of the Executive Orders of 1875–1876 (*supra*), it was a reason founded on a misconstruction of the law prohibiting the sale of liquor to Indians.

The Court below held, in effect, that the sale of liquor was the sole and only basis for the issuance of the Executive Orders. This holding, petitioner says, is error on the face of the record.

The Court below held an amendment was made to the laws prohibiting the introduction of liquor into the Indian country and the sale of liquor to Indians by the Act of February 27, 1877 (19 Stat. 244).

Petitioner now points out this obvious error by the Court below.

As part of the statutes involved petitioner has set out herein the basic statute relating to the introduction of liquor into the Indian country and sale of liquor to Indians, the Act of February 13, 1862 (12 Stat. 339, *ante*, p. 8.) There is also set out Section 2139 of the revised statutes of 1873, Act of June 22, 1874. (18 Stat., Vol. 1, 113, *ante*, p. 8.) It is obvious that the code of 1873 contained an error and that that error was corected by the Act of February 27, 1877. (19 Stat. 244.) The correction is shown in Section 2139 of Code of 1878. (U. S. R. S. 2d Ed. 1878, p. 373; *ante*, p. 9.)

The statutes speak for themselves. The effect of the error in the Revised Statutes of 1873 (*supra*) may have been to give to an Indian in the Indian country the right to sell liquor to another Indian. This would presuppose that the first Indian obtained the liquor legally, which in itself is a legal impossibility. The error in the statute conferred no rights on the white bootleggers either on or off of the permanent reservation.

Each and every Sioux Indian who remained on or who visited on the lands east of the Missouri River was under the charge of the Indian Agents or agents at the agencies on the west bank of that river. The Act of February 13, 1862, (*supra*) section 2139 of the code of 1873, (*supra*) and section 2139 of the code of 1878, (*supra*) (*ante* 8–9) each prohibited the sale, exchange, gift or barter of liquor or wine to any Indian under the charge of any Indian superintendent or Indian agent appointed by the United States.

The record shows that Indian Agent Edmond Palmer, at Grand River Agency, on the west side of the Missouri River, in 1873 reported the Lower Yanktonai "encamped on the other side of the river, opposite the agency" (R. 32). That following the drowning of the agency farmer and two Indians while ferrying the Indians' beef across the river, he engaged the steamer May Lowery to ferry these Indians and their beef across the river. (R. 32.)

Agent John Burke at Standing Rock agency in 1875 reported the construction of "another and additional ferry-boat" for "the dispatch of agency business requiring attention on the east side of the Missouri River." (R. 33.)

The same agent, Burke, in 1876, reported,—"The Indians belonging to this agency are four bands of the Sioux Tribe—Upper and Lower Yanktonai, Uncpapas, and Blackfeet. * * * The Lower Yanktonai have sixteen of their little farming settlements on the east side of the Missouri River." (R. 33.)

The enforcement officers could have prosecuted the liquor dealers occupying the lands on the east bank of the Missouri River at any time under the plain terms of the statute, even the statute containing the error.

There was, therefore, never at any time an actual basis for the addition of these lands to the Sioux reservation, as a

necessity arising out of the liquor traffic. Moreover, the statute was not changed by the elimination of the error contained in the code of 1873, which elimination was made by the Act of February 27, 1877. (*Supra.*)

It is submitted that there was no change in the law prohibiting the sale of liquor by white citizens to Indians by the Code of 1873. Further, it was error by the Court below to decide the contrary.

6. The Reason for the Restoration of the Lands to the Public Domain was the Desire of White Citizens to Obtain Petitioner's Lands.

Petitioner contends that the actual, the moving cause, for the issuance of the Executive Orders of 1879 and 1884 (R. 16, 17, 18) was the desire of white citizens to file homestead or other public land entries on the lands reserved to petitioner.

The real reason for the restoration of the lands to the public domain is shown in this record. It is in that portion of the record which the defendant below requested to be certified to this Court. It is clearly set out in defendant's exhibit No. 34. (R. 53–54.)

One John W. Street, apparently writing from Cleveland, Ohio, on May 28, 1879, voiced the desire of himself and others to settle upon lands set apart for the several Sioux bands as part of their permanent reservation. Mr. Street, as reported by E. J. Brooks, Acting Commissioner of Indian Affairs, petitioned for a modification of the eastern boundary of the Sioux Indian reservation so that he and others could settle thereon under the homestead laws.

From the record it appears that when the lands were not desirable for homestead entry it was quite proper to grant to the Sioux Tribe the "use" of the lands already occupied by these Indians. When, on the other hand, the lands became desirable, when the white citizens actually wanted the right to enter the lands under homestead or other entry, then in the view of the Court below it became expedient and proper for the Executive to rely upon a liquor statute that never had been changed and thereupon to revoke the Executive Orders

which granted to the Sioux Tribe, petitioner herein, the use of the lands here involved.

Many uses have been made of the liquor question but the use made in the instant case by the respondent and the error committed by the Court below are shining examples of the misuse of the question to avoid a promise to an innocent and dependent people and to defeat or attempt to defeat a clear right to have and receive just compensation for property taken.

It is submitted that the land hunger of white citizens was the actual cause for the taking of petitioner's lands.

7. The Executive Orders of 1879 and 1884 Took From Petitioner the Right to Use and Occupy its Lands.

Petitioner contends that the Executive Orders of 1879 and 1884 (R. 16, 17, 18) took from petitioner the right to use and to occupy the lands previously reserved and here involved.

These later orders speak for themselves. No argument is required to show the effect of those orders. The effect was an actual ouster of the Sioux Tribe from the lands east of the Missouri River.

From and after the date of the orders of 1879 and 1884 the lands here involved were open to settlement and entry under the public land laws. The Sioux Tribe had no right to those lands. The taking by the United States was absolute and final.

It is submitted that the Executive Orders of 1879 and 1884 (*supra*) took from petitioner the right to the use and occupation of the land so restored to the public domain. It is further submitted that no compensation whatever has been paid to petitioner for its lands.

8. The Taking of Petitioner's Lands was in the Exercise of the Right of Eminent Domain, for which Petitioner is Entitled to Just Compensation.

Petitioner contends that the taking by the Executive Orders of 1879 and 1884 (*supra*) was such a taking of private property

by the United States, as to require payment of just compensation to petitioner under the Constitution of the United States and the decisions of this Court.

On the question of the duration of an Indian title counsel finds no better definition than that contained in *Spalding* v. *Chandler* (160 U. S. 394, 402). In that case the Court held:

> "The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw fit, until such right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated."

Further in the same case the Court held:

> "As stated, the reserve was not extinguished or the rights of the Indians to the use of the tract destroyed or curtailed by those orders, and if the reservation for public uses and for the purposes of Fort Brady, made by the President's orders, was valid, the operation of those orders, so far as the Indian reserve was concerned, was clearly postponed until after the extinguishment of the reserve either by a voluntary cession to the Government, a cessation or abandonment of the use, or the arbitrary exercise by Congress of its power to appropriate the same."

There is no difference between the duration of an Indian title and the duration of the title of any citizen. Unless specifically limited by the terms of the paper writing which conveys the title, the title remains in full effect until it is conveyed (or ceded); or until it is abandoned; or until the sovereign power, the United States, exercises its right to take the title for its own purposes.

The exercise of the right of eminent domain may take and has taken various forms. In *Seaboard Air Line* v. *United States* (261 U. S. 299) the taking was by requisition under war time powers. In that case this Court held:

At p. 304:

> "Just compensation is provided for by the Constitution, and the right to it can not be taken away by statute. Its ascertainment is a judicial function. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 327, 37 L. ed. 463, 468, 13 Sup. Ct. Rep. 622.
>
> "The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. *Monongahela Nav. Co.* v. *United States, supra.* It rests on equitable principles, and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken."

At p. 306:

> "Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value, paid contemporaneously with the taking."

In *Shoshone Tribe of Indians* v. *United States* (299 U. S. 476) the United States actually took from the Shoshone Tribe and delivered over to the Arapahoe Indians a portion of the reservation set apart for the Shoshone Tribe.

In that case this Court said:

> "Title in the strict sense was always in the United States, though the Shoshones had the treaty right of occupancy with all its beneficial incidents. *United States* v. *Creek Nation, supra* (295 U. S. p. 109, 79 L. ed. 1335, 55 S. Ct. 681). What those incidents are, it is needless to consider now. Cf. *United States* v. *Cook*, 19 Wall. 591, 22 L. ed. 210; *Pine River Logging & Improv. Co.* v. *United States*, 186 U. S. 279, 46 L. ed. 1164, 22 S. Ct. 920; *United States* v. *Paine Lumber Co.*, 206 U. S. 467, 51 L. ed. 1139, 27 S. Ct. 697. The right of occupancy is the primary one to which the incidents attach, and division of the right with strangers is an appropriation of the land pro tanto, in substance, if not in form."

In that case this Court held:

> "Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare

may be exerted in many ways and at times even in derogation of the provisions of a treaty. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 564–566, 47 L. ed. 299, 305, 306, 307, 23 S. Ct. 216. The power does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation * * * ; for that would not be an exercise of guardianship, but an act of confiscation.' *United States* v. *Creek Nation*, *supra* (295 U. S. 110, 79 L. ed. 1335, 55 S. Ct. 681); citing *Lane* v. *Santa Rosa*, 249 U. S. 110, 113, 63 L. ed. 504, 506, 39 S. Ct. 185; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307, 308, 47 L. ed. 183, 190, 23 S. Ct. 115. The right of the Indians to the occupancy of the lands pledged to them, may be one of occupancy only, but it is 'as sacred as that of the United States to the fee.' *United States* v. *Cook*, *supra* (19 Wall. 593, 22 L. ed. 211); *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 47 L. ed. 299, 23 S. Ct. 216, *supra*; *Choate* v. *Trapp*, 224 U. S. 665, 671, 56 L. ed. 941, 944, 32 S. Ct. 565; *Yankton Sioux Tribe* v. *United States*, 272 U. S. 351, 71 L. ed. 294, 47 S. Ct. 142, *supra*. Spoliation is not management."

In *United States* v. *Klamath and Moadoc Tribe of Indians* (304 U. S. 119, 123) this Court held:

"It is appropriate first to observe that while the United States has power to control and manage the affairs of its Indian wards in good faith for their welfare, that power is subject to constitutional limitations, and does not enable the United States without paying just compensation therefor, to appropriate lands of an Indian tribe to its own use or to hand them over to others. *Chippewa Indians* v. *United States*, 301 U. S. 358, 375. * * * The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i.e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking."

In the case at bar the taking from the Sioux Tribe, petitioner, is even more clear than in the last two cited cases, for the act of taking the lands of petitioner is set out in precise words in the Executive Orders of 1879 and 1884 (*supra*).

In a case decided at this term of Court; *United States* v. *Santa Fe Railroad Co.* (Adv. Ops. No. 3, October Term, 1941, L. ed. 86, p. 220) the questions before this Court included both "Indian occupancy" and "Executive Order reservation."

The Executive Order involved in this case was issued January 4, 1883. The words of withdrawal and conveyance were as follows:

> "It is hereby ordered that the following-described tract of country situated in the Territory of Arizona, be, and the same is hereby, set aside and reserved for the use and occupancy of the Hualpai Indians, namely;"
>
> (Kappler, Vol. 1. p. 804.)

The lands involved were those included in the grant to the predecessor of the Santa Fe Railroad Co. by the Act of July 27, 1866 (14 Stat. 292).

The Santa Fe Railroad Co. quit-claimed to the United States all lands claimed by it under the Act of July 27, 1866, within the Walapai Executive Order reservation. This action by the respondent left the question of Indian use and occupancy of the lands in the period prior to the Executive Order of 1883 still before the Court. As to these lands the decision required the railroad company to account for the rents and profits derived from the lands within its grant, which lands were within the Executive Order Reservation and also within the area used and occupied by the Walapai Indians prior to the grant to the railroad.

At p. 223, the Court said:

> "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." * * *
>
> "Indian 'right of occupancy is considered as sacred as the fee simple of the white.'"

At p. 228:

> "As stated in *Choate* v. *Trapp*, 224 U. S. 665, 675, 56 L. ed. 941, 946, 32 S. Ct. 565, the rule of construction recognized without exception for over a century has been that

'doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.'"

At p. 330:

"The Executive Order creating the Walapai Indian Reservation was signed by President Arthur on January 4, 1883.[1] There was an indication that the Indians were satisfied with the proposed reservation. A few of them thereafter lived on the reservation; many of them did not. While suggestions recurred for the creation of a new and different reservation, this one was not abandoned. For a long time it remained unsurveyed. Cattle men used it for grazing and for some years the Walapais received little benefit from it. But in view of all of the circumstances, we conclude that its creation at the request of the Walapais and its acceptance by them amounted to a relinquishment of any tribal claims to lands which they might have had outside that reservation * * *."

Petitioner submits on this record and the foregoing decisions of this Court, that the right to use and occupy the lands east of the Missouri River attached to, as a part of, the Sioux permanent reservation by the Executive Orders of 1875 and 1876 (*supra*) was vested in petitioner by said orders. Further that the taking from petitioner by the Executive Orders of 1879 and 1884 (*supra*) was such as to require the payment to petitioner of just compensation under the Constitution of the United States as amended:

"Nor shall private property be taken for public use, without just compensation."
(Amendments, Art. V.)

---

[1] As to the validity of a reservation established by Executive Order, foot note 17, p. 230 (Idem.) refers to *U. S. v. Midwest Oil Co.*, 236 U. S. 459; *Spalding v. Chandler*, 160 U. S. 394. General Indian Allotment Act of February 8, 1887. 24 Stat. 388, S. 1; 34 Op. Atty. Gen. 181, 186–189.

CONCLUSION.

On the record, petitioner says the decision of the Court below is in error as herein set out; that the decision of the Court below should be reversed and petitioner held entitled to recover.

Respectfully submitted,

RALPH H. CASE,
Attorney for Petitioner,
The Sioux Tribe of Indians.

Of Counsel:
JAMES S. Y. IVINS,
RICHARD B. BARKER.

APPENDIX.

Two maps are attached to this brief, and with this word of explanation constitute this appendix. The maps are not referred to in the brief. They are attached for convenience and only for the purpose of showing, by map No. 1, in a general way, the location of the three principal divisions of the Sioux Indians prior to the making of the Treaty of April 29, 1868 (15 Stat. 635), and by map No. 2, also in a general way, the lands reserved to the Sioux Tribe by the Treaty of April 29, 1868, as a permanent reservation, the lands generally described as "unceded" or "hunting lands" reserved to the Sioux Tribe by the Treaty of 1868, and lastly the lands covered by the Executive Orders of 1875–1876 (which are referred to in the foregoing brief). On the small scale of the maps it is impossible to show land areas with absolute accuracy. The maps, however, counsel believes, present a reasonably accurate picture of the land area which is the subject of the foregoing brief, and, as well, the permanent reservation of the Sioux Tribe. No argument is based upon these maps, nor is there any request for conclusions based thereon. Counsel, however, feels that the maps may be of some assistance to the Court in showing the geography of the areas under discussion.

TERRITORY OF THE SIOUX TRIBE
ACT OF FEB. 28, 1877

Map No. 3

DEPARTMENT OF THE INTERIOR
U S GEOLOGICAL SURVEY

UNITED STATES

Edition of Mar. 1911, reprinted 1929
Polyconic projection.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1941.

No. 798.

THE SIOUX TRIBE OF INDIANS, PETITIONER,

v.

THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

REPLY BRIEF FOR THE SIOUX TRIBE OF INDIANS, Petitioner.

RALPH H. CASE,
Attorney of Record,
Southern Building,
Washington, D. C.

Of Counsel:
JAMES S. Y. IVINS,
RICHARD B. BARKER.

THE McQUEEN PRESS

Supreme Court of the United States.

OCTOBER TERM, 1941.

No. 798.

THE SIOUX TRIBE OF INDIANS, PETITIONER,

v.

THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

REPLY BRIEF FOR THE SIOUX TRIBE OF INDIANS, Petitioner.

Comes now the petitioner, by counsel, and submits the following reply to the brief filed in this case by respondent, The United States.

RESPONDENT'S "QUESTIONS PRESENTED."

The respondent has assumed to restate the questions presented in the petition for certiorari herein. The questions presented by respondent, if considered, are objected to as follows:

1. No question of "ownership" is involved in this case, as stated in respondent's questions No. 1 and No. 2 (p. 2). The grant to petitioner was the *use* of the lands, not the ownership. "Ownership" implies a broader title and includes the right of alienation. This the Indians did not have, but there was granted to the Sioux Tribe, petitioner, the right to the use of the land. The land was attached to the Sioux permanent reservation of 1868 "as a part thereof."

2. The question of the "agreement of 1876" referred to

in respondent's question No. 3 (p. 2) is not in the record before this Court. As petitioner will show, there was no "agreement of 1876" between the United States and the Sioux Tribe of Indians. Further discussion of this matter will be found at a later point in this brief.

RESPONDENT'S STATEMENT AND ARGUMENT.

To avoid repetition petitioner deals with respondent's statement of the case and respondent's summary and argument on the questions presented by the petition on which writ of certiorari was granted herein.

The statement of the case by respondent contains assumptions and misstatements and conclusions hereinafter noted.

The summary of argument and argument contain similar matters to which the petitioner objects.

The brief of respondent divides its summary and the argument into three principal divisions: Section 1 relates to the power of the President to create or expand Indian reservations by Executive Order. Section 2 relates to the quantum of title obtained by petitioner under the Executive Orders of 1875–1876 and the liquor traffic. Section 3 relates to the alleged agreement of 1876.

THE POWER OF THE PRESIDENT TO ISSUE THE EXECUTIVE ORDERS.

In dealing with the power of the President to issue the Executive Orders here in question the respondent has made reference to a letter dated March 23, 1875, signed by the Commissioner of Indian Affairs (R. 10). A portion of that letter is requoted in respondent's brief (p. 6) and contains the following statement: "This order does not affect existing rights of any persons resident within the limits of the territory withdrawn,—"

No Executive Order affecting public lands nor any act of Congress has ever assumed to take from bona fide settlers on the public domain rights which they had previously acquired under the public land laws. The implication apparently relied upon by respondent is that, by reason of the statement made by the Commissioner of Indian Affairs, the Executive Orders

granted something less than appears on the face of the Executive Orders.

Again in the same quotation it is apparent that the respondent relies on the following:—"nor is it supposed that the withdrawal will be made permanent,—" On its face this is a supposition and an opinion by the Commissioner of Indian Affairs.

The legal effect of the Executive Orders of 1875 and 1876 is for this Court to determine. The opinion of Government officials and suppositions by the respondent are not controlling.

No where in respondent's brief does respondent say that the President did not have the power to issue the Executive Orders of 1875–1876. In fact, the respondent admits that the orders were effective and granted to the Sioux Tribe, petitioner, the right to the use of the lands covered by the said Executive Orders.

The respondent on page 10 denies that the President had the right to alienate permanently the beneficial ownership of the land here in question. That is an adroit misstatement of the question before the Court. First, there is no such thing as a "permanent disposition" of public lands, either by the President or by the Congress. At all times the sovereign power of the United States holds the basic title. Secondly, there is not in this case the question of the "beneficial ownership." The grant to the Sioux Tribe, petitioner, was the use of the land. As previously stated the Tribe had the use of the land but did not have all of the elements of ownership, hence the question of "ownership" is not before the Court.

The respondent admits that the orders were issued and were effective to deliver over to the Sioux Tribe, petitioner, the use of the land.

On page 10 of respondent's brief appears the following:

> "Consequently, the four orders here involved undoubtedly were effective to set aside the described 'Indian Country' or as an 'Indian Reservation,' for so long as the orders were unrevoked."

On page 20 the respondent says as follows:

> "The lands set aside by executive orders for the use of the Sioux as additions to the permanent treaty reservation were, therefore, lawful reservations, during the period in which the executive orders were effective."

The additions by the Executive Orders to the permanent reservation were made under and in comformity with the Treaty of 1868 and in the exact words of that treaty which provided for extensions to the permanent reservation. The terms used in the Treaty are general;—"or in such territory as may be added to this reservation for the use of said Indians." (Art. 2, Treaty of April 29, 1868, 15 stat. 635.) As the President theretofore, then and thereafter had exercised the power of creating or enlarging Indian reservations by Executive Order and as he did issue the Executive Orders of 1875 and 1876 and as the Courts and the Congress have directly or indirectly confirmed or ratified his acts in this respect, then the Executive Orders of 1875 and 1876 were issued by due authority, in the words and in conformity with the Treaty of 1868.

Petitioner has shown definitely that the Executive Orders of 1875 and 1876 were issued exactly in the terms of and under and in accordance with the Treaty of April 29, 1868 (15 Stat. 635).

Further, on page 13 of respondent's brief reference is made to the Treaty of 1868, *supra*, in the following language:

> "This agreement bars any claims to beneficial ownership upon the basis of aboriginal use and occupation."

In reply petitioner calls attention to the record and to petitioner's brief. The Treaty of 1868 anticipated and foresaw the probability that additions would be made to the permanent reservation created by that treaty. A substantial portion of the Sioux Tribe, the Upper and Lower Yanktonai bands were then living on the east side of the Missouri River. These bands were induced to execute the Treaty of 1868 by a promise made by the Treaty Commissioners that the Commissioners would do all within their power to have the permanent reservation extended to "the James River country." The Upper and Lower Yanktonai bands continued to live in the country

east of the Missouri River after the Treaty of 1868 was ratified by the Senate. These two bands of the Sioux Tribe continued in the use and occupation of the area here in question.

We therefore have the following:

A permissive use and occupation founded on aboriginal use and occupation; coupled with a promise to endeavor to have the permanent reservation extended to the James River; coupled again with the Executive Orders of 1875 and 1876. This chain makes the aboriginal use and occupation continuous and uninterrupted and finally recognized by the Executive Orders of 1875 and 1876.

The respondent at page 16 again refers to the *Midwest Oil* case and says that the decision therein does not "hold that the President had power to grant irrevocable title to the Indians." There is no such thing as an irrevocable title in our law. The Executive Orders here in question not only could be revoked but actually were revoked by the Executive. The Congress might have done the same. The question here is not on the power to revoke the Executive Orders but the question is on the taking from the Sioux Tribe, petitioner, by the revocation of the Executive Orders of 1875, 1876 of the property rights of the petitioner.

The respondent at page 22 refers to the Act of March 3, 1927 (44 Stat. 1347) in the following language:

> "Finally, the Act of March 3, 1927, c. 299, Sec. 4, 44 Stat. 1347, provided that changes in the boundaries of executive order reservations should not be made except by Act of Congress."

This act is a supplement or following act to the Act of June 30, 1919 (41 Stat. 3, 34), which was cited and relied upon in petitioner's brief (p. 17).

The Act of March 3, 1937, not only prevented the extension of Indian Reservations previously established by Executive Orders but the act prohibited the reduction of such reservations by such Executive Orders. Both by the Act of 1919 and the Act of 1927 the Congress has recognized the practice of the President to create Indian reservations or to expand Indian

reservations by Executive Orders and in so doing confirmed the previous existence of the power of the President.

There were, as stated in *Midwest Oil* v. *United States* and as appears from the briefs in this case, a large number of Executive Orders which created or enlarged Indian reservations. We have, we submit, fully established the power of the President to issue the orders. We have also established that the orders were effective to deliver over to the Indian Tribes covered by the orders whatever rights and privileges, whatever use or occupation, or whatever title which each separate particular Executive Order recited and set out on the face of each such order.

The petitioner is not here engaged in an endeavor to analyze each and every one of the "99 executive orders establishing or enlarging Indian Reservations" referred to by the Court in *Midwest Oil* v. *United States.* The petitioner, however, does contend that the Executive Orders adding land to the Sioux permanent reservation of 1868 by the Executive Orders of 1875 and 1876 were, as stated in petitioner's brief, made in conformity with the treaty (Treaty of April 29, 1868); that the said Executive Orders contained no words of limitation on the duration of the Executive Orders; that by those Executive Orders the petitioner obtained, as by a grant, the definite right to the use and occupation of the land in question; that this right was a property right and a thing of value.

QUANTUM OF TITLE OBTAINED BY PETITIONER AND THE LIQUOR QUESTION.

Answering the second principal division of respondent's statement and argument (pp. 35–42), the question of the quantum of title obtained by the petitioner is necessarily covered in the foregoing portion of this brief.

We have shown that the petitioner did not obtain an absolute, irrevocable ownership of the land here in question, but obtained the use of the land and did have at the time the orders were issued and thereafter the actual occupation of the land. The respondent contends that the sale of liquor was the sole

and only reason for the issuance of the Executive Orders of 1875–1876. The respondent would have the Court read the Executive Orders of 1875–1876 "in the light of the peculiar circumstances requiring their issuance" (respondent's brief, p. 16).

The words "in the light of the peculiar circumstances requiring their issuance" is an assumption not borne out by the record. There were various reasons for the issuance of the Executive Orders: An inducement to sign the Treaty of 1868; a provision of the treaty itself anticipating an extension of the permanent reservation; the acquiescence of the United States in the continued occupation of the lands east of the Missouri River by the Sioux Tribe; the continuing agency service by the United States to the Sioux east of the Missouri River; the recommendation of Agent Swan for the establishment of an agency east of the Missouri River (all discussed in petitioner's brief) all of which are disregarded by the respondent, whose faith is pinned to the unsound liquor question.

It can not be held that the liquor question was the sole and only reason, even though respondent has persistently insisted that the liquor question was the sole and only reason for the issuance of the Executive Orders.

Apparently the respondent has abandoned the theory that by the error contained in the code of 1873, referred to in petitioner's brief, pages 24, 25, 26, the liquor dealers could not be prosecuted. To this extent the respondent has also abandoned the decision of the Court below. (See specification of error No. 7, petitioner's brief, p. 12.)

Since the respondent has abandoned the technical question of the error contained in the code of 1873, which error did not affect the prosecution of the liquor dealers, there still remain several reasons hereinbefore set out in detail and set out in petitioner's brief, which were the sound basis for the issuance of the Executive Orders of 1875–1876, and further there remains the controlling reason for the issuance of the Executive Orders of 1879 and 1884 which took these lands from the Sioux Tribe, petitioner, and restored the lands to the public domain.

The respondent has wholly failed to answer, and in fact has made no reference, whatsoever, to the real reason for the

Executive Orders of 1879 and 1884 restoring the lands in question to the public domain. Having been completely ignored as to this very important matter we do not feel at liberty to restate the reason for the orders of 1879, 1884 except to say—petitioner's brief in this case sets out in full the real reason for the taking of these lands from petitioner by the United States and the restoration of the lands to the public domain (petitioner's brief pp. 26–27).

ALLEGED AGREEMENT OF 1876.

The third question presented by respondent relates to and sets up the alleged agreement of 1876 between the Sioux Tribe and the United States. The respondent says in its brief (p. 8):

> "Between September 23 and October 27, 1876, with a full understanding of the condition imposed by the Act of Congress, the various bands of Sioux signed an agreement, which was ratified by the Act of February 28, 1877, 19 Stat. 254 (R. 19)."

The Act of February 28, 1877, *supra*, took from the Sioux Tribe, not by agreement but by force of the act, all of the Sioux territory west of the 103rd meridian and the forks of the Cheyenne River. That confiscation of the lands of the Sioux Tribe is now in litigation between that Tribe and the United States in the case pending in the Court of Claims, No. C–531–(7), the Black Hills.

The legal effect of the Act of February 28, 1877, has not yet been decided. The Sioux Tribe in the Court below denies, in that pending case, that an agreement was ever entered into respecting the western and northern boundaries of the Sioux permanent reservation. Petitioner regards the injection of the Act of February 28, 1877, into the case at bar as inappropriate and as an attempt on the part of respondent to pre-try a case pending in the Court below.

There is, however, a more definite reason why the Act of February 28, 1877, has no application here. That reason is that the act itself relates only to the western and northern boundaries of the Sioux permanent reservation of 1868. The act, which is

set out in part in appendix D to respondent's brief (pp. 58,59), by its terms relates only to the northern and western boundaries of the permanent reservation as diminished by the act itself. No reference is made in the Act to the eastern boundary of the permanent reservation of 1868, i. e., either the eastern bank of the Missouri River or the 99th meridian of longitude west of Greenwich.

Respondent represents to this Court that the Act of February 28, 1877, took also from the Sioux Tribe the lands between the Missouri River and the 99th meridian west of Greenwich. This request by respondent is erroneous in the face of the fact that the act itself does not relate to the eastern boundary of the Sioux permanent reservation as extended by the Executive Orders here in question; and in the face of the further fact that the lands between the Missouri River and the 99th meridian, W., were not opened to homestead settlement and entry and still remained in the use and occupation of the Sioux Tribe until the Executive Orders of 1879 and 1884, taking the lands here in question, were issued by the Executive.

If the eastern boundary of the Sioux reservation was changed in any way by the Act of February 28, 1877, then certainly no Executive Order was required to restore the lands between the Missouri River and meridian 99° west of Greenwich to the public domain. The Court will take notice, however, that lands west of the 103d meridian and the forks of the Cheyenne River (the western boundary of the permanent reservation as diminished by the Act of February 28, 1877) were opened to settlement and entry by the Act of February 28, 1877, and particularly including the great Black Hills area, fabulously rich in gold, rare minerals and timber.

All these matters in regard to the Act of February 28, 1877 (*supra*),—the loss occasioned to the Sioux Tribe by reason thereof,—the question of the Tribe's right to recover, are still pending before the Court of Claims.

The absence in the Act of February 28, 1877, of any reference to the eastern boundary of the reservation, whether as to the Missouri River or 99° west of Greenwich, is so plain and so obvious that even the Court below disregarded this argument, but finding it here again counsel can only conclude that the

reference to this act is an attempt by respondent to pre-try and to have pre-judged the legal effect of the act of February 28, 1877.

On page 47, in the concluding paragraph of respondent's brief, appears a reference to the Act of March 2, 1889 (25 Stat. 888). This is the first and only reference to that Act made by respondent. This reference might be dismissed as a "last hope," all other defenses having failed.

Petitioner, however, does not overlook the reference, but calls to the Court's attention these facts:

There is no such thing as a ratification of a finality. The taking by the United States from the Sioux Tribe, petitioner, by the Executive Orders of 1879 and 1884 was a finality. Nothing remained to be said or done until the Congress by the Act of June 3, 1920 (41 Stat. 738), gave petitioner herein the right to bring this suit. There is no release in the Act of March 2, 1889, nor any words which purport to be a release of the rights of the Sioux Tribe in the land involved in this, the case at bar. There does not appear any quotation from the Act of March 2, 1889, in respondent's brief nor in the appendix.

However, should this Court decide that the lands here in question were in fact and in law opened to settlement under the Act of March 2, 1889, *supra*, petitioner would be quite content with that decision as final.

The respondent, by injecting the Act of March 2, 1889, *supra*, has invited an outcome it knows not of, but petitioner does not seek to take advantage of respondent. The Act of March 2, 1889, *supra*, provides for the payment by the United States for all lands ceded by the said act at fixed rates; all such sums to bear interest at a fixed rate from and after the dates of disposition of the lands.

CONCLUSION:

We submit that there is established by the record and our briefs the following:

1. The President had and exercised the power to issue the Executive Orders of 1875–1876.
2. Those orders were effective to set over to the Sioux Tribe an interest in the lands involved.
3. That interest was a private property right, a thing of value, to the Sioux Tribe.
4. The taking of that interest by the United States was in the exercise of the sovereign power of eminent domain, and

Therefore the Sioux Tribe, petitioner, is entitled to just compensation for the private property so taken.

RALPH H. CASE,
Attorney of Record,
Southern Building,
Washington, D. C.

Of Counsel:
JAMES S. Y. IVINS,
RICHARD B. BARKER.

No. 798

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE SIOUX TRIBE OF INDIANS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statutes and Executive Orders Involved	2
Statement	2
Argument	6
Conclusion	10
Appendix	11

CITATIONS

Statutes:	
Agreement of February 28, 1877, 19 Stat. 254	5, 9
Indian Appropriation Act of August 15, 1876, c. 289, 19 Stat. 176	4, 8
Treaty of 1868, 15 Stat. 635	7, 11
Executive Orders:	
Executive Order of January 11, 1875	12
Executive Order of March 16, 1875	12
Executive Order of May 20, 1875	13
Executive Order of November 28, 1876	14
Executive Order of August 9, 1879	14
Executive Order of March 20, 1884	16

439717—42——1

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 798

THE SIOUX TRIBE OF INDIANS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 20–30) is not yet reported.

JURISDICTION

The judgment of the Court of Claims sought to be reviewed was entered on April 7, 1941 (R. 30). A motion for a new trial was denied October 6, 1941 (R. 30–31). The petition for a writ of certiorari was filed December 12, 1941. The jurisdiction of this Court is invoked under section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether four executive orders issued in 1875 and 1876 withdrawing from sale and setting apart "for the use of the several tribes of Sioux Indians as an addition to their present reservation" certain lands in the public domain in order to cut off whiskey dealers from access to the Indian settlements, conveyed such an estate to the Indians that they must be compensated for the reopening and settlement of the lands when the occasion for the withdrawal had ceased.

STATUTES AND EXECUTIVE ORDERS INVOLVED

The material portions of the Treaty of 1868 with the Sioux Indians, which set apart their reservation, 15 Stat. 635, the Executive Orders of January 11, 1875, March 16, 1875, May 20, 1875, and November 28, 1876, which withdrew certain land in the public domain from settlement (R. 9, 11, 12, 13–14) and the Executive Order of August 9, 1879, and March 20, 1884, reopening the lands for settlement (R. 16–17, 18) are set out in Appendix, *infra*, pp. 11–16.

STATEMENT

Under authority of the Act of June 3, 1920, c. 224, 41 Stat. 738, the plaintiff filed a petition in the Court of Claims seeking to recover, with interest, the value of approximately 5,600,000 acres of land alleged to have been misappropriated by the United States in 1879 and 1884 (R. 1–6).

The findings of the Court of Claims (R. 7–20) may be summarized as follows:

By Article II of the Treaty of 1868, the United States "set apart for the absolute and undisturbed use and occupation" of the Sioux Indians the Great Sioux Reservation, made up of a large tract of land north of Nebraska and west of the Missouri river and two small existing reservations on the east bank of the river (R. 7–8). In exchange the Sioux relinquished all their claims to any other territory (R. 8).

The treaty opened to settlement the east bank of the river and thus afforded white men carrying on liquor traffic with the Indians ready access to the Great Sioux Reservation (R. 8). By January 8, 1875, this traffic had become such a problem that the Commissioner of Indian Affairs recommended to the Secretary of the Interior, and the Secretary recommended to the President, that the President should withdraw certain lands from sale and set them apart for Indian purposes, such action "being deemed necessary for the suppression of liquor traffic with the Indians upon the Missouri River" (R. 8, 9). On January 11, 1875, the President issued an order that the tract be "withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation" (R. 9). The Indian agencies were notified of the withdrawal, "the same being deemed necessary for the suppression of the liquor traffic"

(R. 9). A month later the Commissioner for Indian Affairs answered a petition sent to the President by settlers in this tract giving the same explanation and stating (R. 10):

> This order does not affect existing rights of any persons, residents within the limits of the Territory withdrawn, nor is it supposed that the withdrawal will be made permanent, or that any purchases will be made by the Government of property owned by individuals, in the tract of country withdrawn.

On three subsequent occasions in 1875 and 1876 the President issued executive orders phrased in the same terms as the Executive Order of January 11, 1875. Each was issued upon the recommendations of the Commissioner of Indian Affairs and the Secretary of the Interior that the withdrawal was necessary to stop the illicit whiskey traffic. Each time the local Indian agents were notified that that was the purpose and on the occasion of the last order they were also notified that it "is not intended to interfere with the vested rights of any settler upon the tract or with the legitimate business pursuits of any person lawfully residing within its limits" (R. 12–14).

After three of these orders had been issued but before the fourth, Congress enacted the Indian Appropriation Act of August 15, 1876, c. 289, 19 Stat. 176, 192, which provided that no future ap-

propriation should be made for the subsistence of the Sioux—

> unless they shall first agree to *relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight* for said Indians; and also so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude. * * * [Italics added.]

The Sioux thereupon executed an agreement, which was ratified by Congress on February 28, 1877 (19 Stat. 254, 255), whereby the north and west boundaries of the Great Sioux Reservation set out by the Treaty of 1868 were modified and "all the territory lying outside the said reservation," as modified, was relinquished to the United States (R. 19–20).

On August 9, 1879, President Hayes issued an order restoring to the public domain the greater part of the lands withdrawn by the Executive Orders of 1875 and 1876 (R. 16–17). On March 20, 1884, President Arthur completed the restoration of the lands withdrawn (R. 18). The orders were issued upon the recommendation of the Commissioner of Indian Affairs that the lands were no longer necessary to protect the Indians from whiskey dealers (R. 15–16, 17–18).

Upon these findings of fact the Court of Claims decided, as a conclusion of law, that the plaintiff

was not entitled to recover (R. 20). Accordingly, the petition was dismissed (R. 30).

ARGUMENT

1. The Court of Claims expressly based its decision upon its interpretation of the Executive Orders of 1875 and 1876, holding that under all the circumstances it was clear that the orders were "intended as a temporary expedient in order to protect the Indians" and were "temporary in their nature and could be withdrawn at any time" (R. 30). The narrow question of the correctness of this interpretation of four executive orders issued and superseded more than fifty years ago has not sufficient public importance to require review by this Court. Nor is there any conflict of decisions to be resolved.

The decision of the Court of Claims, moreover, is plainly correct. The recommendations of the Commissioner and Secretary upon the basis of which the orders were drawn and executed, show clearly that the sole purpose was to curb the illicit whiskey traffic. It would be an extraordinary measure for the President to check this temporary evil by a permanent gift of the entire beneficial ownership of more than 5,600,000 acres of the public domain. The purpose of the orders could be completely achieved by temporarily withdrawing the lands from settlement and thus cutting off white men from access to the Missouri

River until the traffic had ceased.[1] Therefore, although the orders did not expressly state that they were temporary and intended to grant no rights to the Sioux, the phrase "for the use of" the Sioux must be taken to mean for the temporary purpose of protecting the Indians and not for occupation as a permanent home.[2]

---

[1] Petitioner's assertion that the Executive Orders were issued for the additional purpose of caring for Indians not living on the Great Sioux Reservation (Pet. 16) is plainly contrary to the recommendations upon which the orders were issued for they state no purpose except to check the liquor traffic (R. 8–14). And, it seems likely that Article VI of the Treaty of 1868, 15 Stat. 635, 637, was designed to give some protection to Indians living off the reservation for it provided:

"* * * And it is further stipulated that any male Indians over eighteen years of age, of any band or tribe that is or shall hereafter become a party to this treaty, who now is or shall hereafter become a resident or occupant of any reservation or territory not included in the tract of country designated and described in this treaty for the permanent home of the Indians * * * and who shall have made improvements thereon of the value of two hundred dollars or more, and continuously occupied the same as a homestead for the term of three years, shall be entitled to receive from the United States a patent for one hundred and sixty acres of land including his said improvements, the same to be in the form of the legal subdivisions of the surveys of the public lands. * * *"

[2] Petitioner's suggestion that the restoration of the lands was based upon a misinterpretation of the statutes punishing illicit whiskey trading (Pet. 17), is immaterial. The record is clear that the Commissioner thought the statutes had been changed so as to enable him to deal with the whiskey traffic even if the lands were reopened, and that that was the reason for reopening them (R. 14–19, 55–59).

439717—42——2

The officers charged with the responsibility of administering the orders interpreted them to have that meaning. The Commissioner of Indian Affairs in 1875 twice advised settlers within the territory embraced by the initial order that it was not intended to interfere with their existing occupancy and their lawful pursuits (R. 10). On one of those occasions he also stated that it was not "supposed that the withdrawal will be made permanent" (R. 10). Later, upon directions from the Secretary of the Interior, he instructed the agents to restrain the Indians from molesting settlers on lands covered by the order (R. 10). These steps are wholly inconsistent with a purpose to grant the lands to the Indians.

Both Congress and the Sioux Indians appear to have interpreted the three Executive Orders of 1875 as adding no additional land to the Great Sioux Reservation. While the Commissioner was giving the above mentioned advice to settlers, Congress enacted the Indian Appropriation Act of August 15, 1876, c. 289, 19 Stat. 176, 192, which provided that no future appropriation should be made for the subsistence of the Sioux "unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight for said Indians * * *" and also to modify the western boundary of the reservation. Thereupon, the

Sioux executed an agreement whereby new north and west boundaries to the reservation were fixed and the Sioux relinquished to the United States "all the territory lying outside the said reservation" as modified. 19 Stat. 254, 255. The provisions of the statute and agreement would have been entirely inappropriate if Congress and the Sioux had considered that the Sioux, as a result of the executive orders, had any rights in territory outside the original reservation.[3] The fourth executive order, which was issued after the enactment of the act, is modelled upon the other three and must be ascribed the same meaning.

2. The petitioner poses certain questions as to the power of the President to create permanent Indian reservations, the taking of which by the United States would entitle the Indians to compensation (Pet. 11, 14–15). No such questions are presented in the present case. The court below decided that the four orders in question were

[3] If the three Executive Orders of 1875 did grant the Sioux any rights in the lands withdrawn from settlement, then the Sioux relinquished such rights by this treaty for they had a full understanding of the requirements of the statute (R. 19). In the court below the petitioner sought to avoid the effect of the release by arguing that "the permanent reservation" and "said reservation" refer to the original reservation plus land covered by the executive orders because provision for additions is made in Article II of the Treaty of 1868. But the statute plainly required the Sioux to relinquish their claims to lands "*outside the boundaries* of the permanent reservation *established by the treaty.*" [Italics supplied.]

valid but concluded that they were not intended to convey any rights to the Sioux. Its decision has no bearing upon the larger question of the validity of executive orders reserving for Indians as a permanent home the use and occupation of lands in the public domain. Plainly, this question of the power of the President to alienate lands in the public domain, does not arise until it is shown that he attempted to exercise it.

CONCLUSION

The decision of the court below is correct and presents no conflict of decisions or question of general importance. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
ROGER P. MARQUIS,
ARCHIBALD COX,
Attorneys.

JANUARY 1942.

APPENDIX

Treaty of 1868 between the United States and the Sioux Nation, ratified February 16, 1869, 15 Stat. 635:

ARTICLE II

The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the government as

may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.

Executive Order of January 11, 1875 (R. 9):

EXECUTIVE MANSION,
January 11, 1875.

It is hereby ordered that the tract of country in the Territory of Dakota lying within the following described boundaries, viz: Commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same; thence east with said parallel of latitude to the ninety-ninth degree of west longitude; thence south with said degree of longitude to the east bank of the Missouri River; thence up and with the east bank of said river to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

U. S. GRANT.

Executive Order of March 16, 1875 (R. 11):

EXECUTIVE MANSION,
March 16, 1875.

It is hereby ordered that the tract of country in the Territory of Dakota lying within the following-described boundaries, viz, commencing at a point where the one

hundred and second degree of west longitude intersects the forty-sixth parallel of north latitude; thence north on said one hundred and second degree of longitude to the south bank of the Cannon Ball River; thence down and with the south bank of said river to a point on the east side of the Missouri River, opposite the mouth of said Cannon Ball River; thence down and with the east bank of the Missouri River to the mouth of Beaver River; thence up and with the south bank of Beaver River to the one hundredth degree of west longitude; thence south with said one hundredth degree of longitude to the forty-sixth parallel of latitude; thence west with said parallel of latitude to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

U. S. GRANT.

Executive Order of May 20, 1875 (R. 12):

EXECUTIVE MANSION,
May 20, 1875.

It is hereby ordered that that portion of the public domain in the Territory of Dakota lying south of an east and west line from the northwest corner of the Yankton Indian Reservation to the ninety-ninth degree of longitude, and between said longitude and the Missouri River on the west and the Yankton Indian Reservation on the east, be, and the same hereby is, withdrawn from sale and settlement and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

U. S. GRANT.

Executive Order of November 28, 1876 (R. 13):

EXECUTIVE MANSION,
November 28, 1876.

It is hereby ordered that the tract of country in the Territory of Dakota on the east side of the Missouri River, lying within the following boundaries, viz: Commencing at a point on the south bank of Beaver River, intersected by the one hundredth degree of west longitude; thence in a direct line to the east corner of the Fort Rice Military Reservation; thence in a southwestern direction along the said military reservation to the east bank of the Missouri River; thence with the east bank of the Missouri River to the mouth of Beaver River; thence up and with the south bank of Beaver River to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

U. S. GRANT.

Executive Order of August 9, 1879 (R. 16–17):

EXECUTIVE MANSION,
August 9, 1879.

It is hereby ordered that all that portion of the Sioux Indian Reservation in Dakota Territory created by Executive orders dated January 11, March 16, and May 20, 1875, and November 28, 1876, lying within the following-described boundaries, viz: Beginning at a point where the west line of the Fort Randall Military Reservation crosses the Missouri River; thence up and along said river to the mouth of American Creek; thence up and along said creek to the ninety-ninth degree of west longitude; thence south along said degree to a point

due west from the northwest corner of the Yankton Indian Reservation; thence due east to the northwest corner of said reservation; thence due south to the north boundary line of Fort Randall Military Reservation; thence following said boundary line northwesterly to the northwest corner of said military reservation; thence south on the west boundary line of said reservation to the place of beginning. And also the following-described land: Beginning at the east bank of the Missouri River at the mouth of Medicine Knoll Creek; thence up and along the Missouri River to the boundary line of Fort Sully Military Reservation; thence northeasterly along said boundary line to the southeast corner of said military reservation; thence northwesterly along the boundary line of said reservation to the northeast corner thereof; thence due north to the east bank of the Missouri River; thence up and along the east bank of said river to the mouth of the Bois Cache; thence due north to the east bank of the Missouri River; thence up and along the east bank of said river to the south line of township 129 north; thence east along said township line to the line between ranges 78 and 79 west; thence north along said range line to Beaver Creek, or the north boundary line of the reservation set aside by the Executive order of March 6, 1875; thence west along said creek to the east bank of the Missouri River; thence up and along said east bank to the southeast corner of Fort Rice Military Reservation; thence northeasterly along said military reservation to the east corner of said reservation; thence in a direct line to a point on the south bank of Beaver Creek where said creek is inter-

sected by the one-hundredth degree of west longitude; thence south with said one-hundredth degree of longitude to the forty-sixth parallel of north latitude; thence east with said parallel of latitude to the ninety-ninth degree of west longitude; thence south with said degree of longitude to its intersection with the north boundary line of the old Sioux or Crow Creek Reservation; thence west along the north boundary line of said reservation to the eastern boundary line of the old Winnebago Reservation; thence north along said east line to the northeast corner of said Winnebago Reservation; thence west along the north boundary line of said reservation to the middle channel of Medicine Knoll Creek; thence down the middle channel of said creek to the place of beginning, be, and the same hereby is, restored to the public domain.

R. B. HAYES.

Executive Order of March 20, 1884 (R. 18):

EXECUTIVE MANSION,
March 20, 1884.

It is hereby ordered that the lands embraced within the three existing Executive additions to the Great Sioux Reservation, in Dakota, east of the Missouri River, viz, the one opposite the Standing Rock Agency, the one opposite the mouth of Grand River and the site of the old Grand River Agency, and the one opposite the mouth of Big Cheyenne River and the Cheyenne River Agency, be, and the same are hereby, restored to the mass of the public domain, the same being no longer needed for the purpose for which they were withdrawn from sale and settlement.

CHESTER A. ARTHUR.

U. S. GOVERNMENT PRINTING OFFICE: 1942

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 8 1942
CHARLES ELMORE CROPLEY
CLERK

No. 798

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE SIOUX TRIBE OF INDIANS, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Treaty, statutes, and executive orders involved	2
Statement	3
The Treaty of 1868	3
The Executive Orders of 1875 and 1876	5
The Executive Orders of 1879 and 1884	6
The Agreement of 1876	7
This Suit	9
Summary of Argument	9
Argument	12
I. The President did not have power to convey to the Sioux the lands in question	17
A. The power of the President to make temporary withdrawals from the public domain did not include the power to convey beneficial ownership	17
B. Congress never delegated to the President, and the President in fact never attempted to exercise, power to grant to Indian tribes beneficial ownership of portions of the public domain	21
1. The Executive	23
2. Congress	26
3. The Courts	32
II. The Executive Orders of 1875 and 1876 did not purport to grant beneficial ownership to the Sioux	35
III. By the Agreement of 1876 the Sioux released any rights they might have had in the lands covered by the first three Executive Orders	42
A. The release included any rights petitioner might have in the lands here involved	43
B. The Agreement of 1876 was valid	44
Conclusion	47
Appendix A	48
Appendix B	51
Appendix C	54
Appendix D	57
Appendix E	60

452222—42——1

CITATIONS

Cases: Page

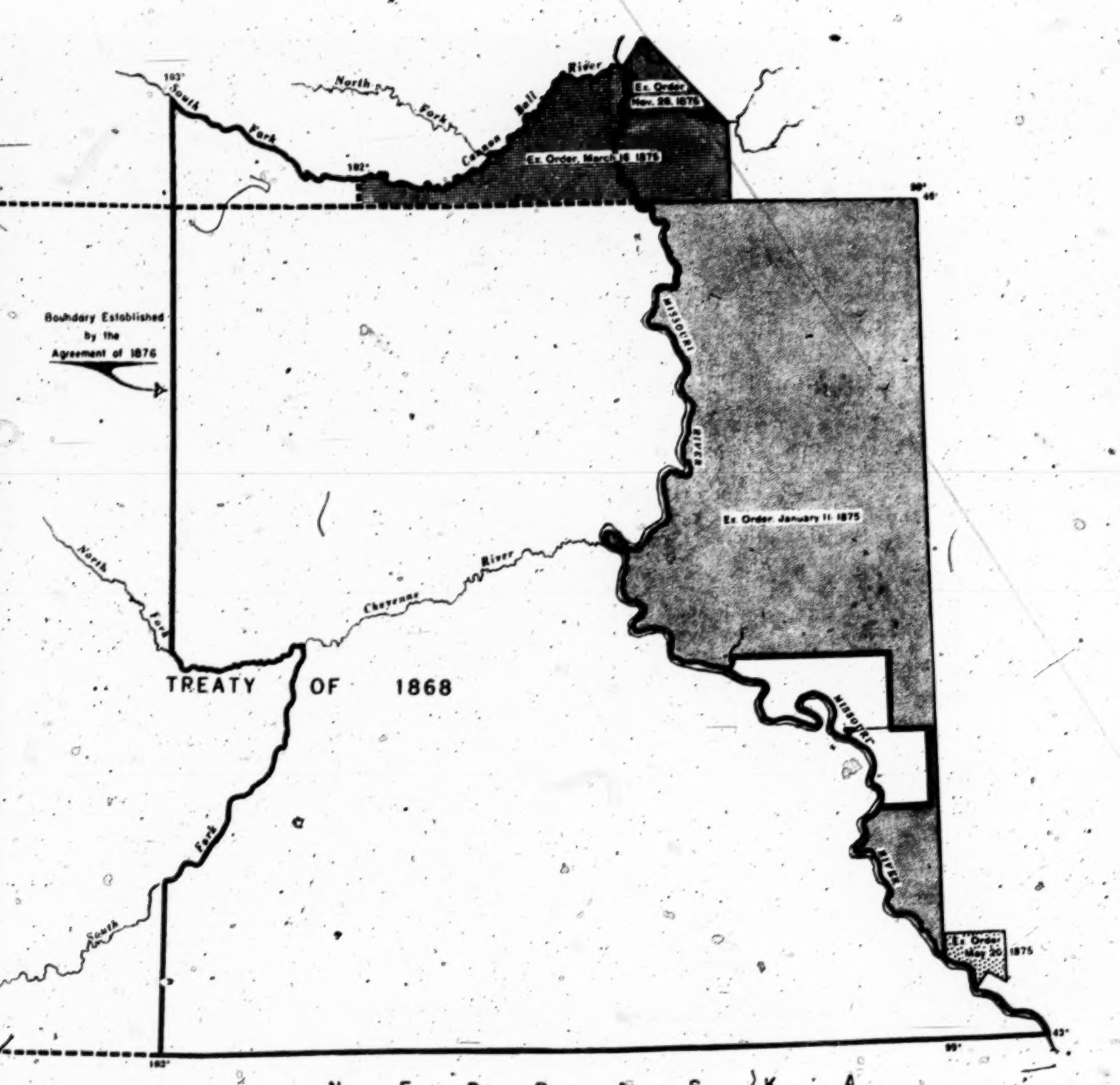
Cherokee Nation v. *Hitchcock*, 187 U. S. 294 46
Chippewa Indians v. *United States*, 88 C. Cls. 1, affirmed 307 U. S. 1 46
Coos Bay Indian Tribes v. *United States*, 87 C. Cls. 143, certiorari denied, 306 U. S. 653 14
Colton, C. N., 12 L. D. 205 30
Creek Nation v. *United States*, 92 C. Cls. 269, certiorari denied, 313 U. S. 581 46
Donnelly v. *United States*, 228 U. S. 243 14
Duwamish et al. Indians v. *United States*, 79 C. Cls. 530, certiorari denied, 295 U. S. 755 14
Gibson v. *Anderson*, 131 Fed. 39 18
Gibson v. *Chouteau*, 13 Wall. 92 17
Grisar v. *McDowell*, 6 Wall. 364 17
Klamath Indians v. *United States*, 296 U. S. 244 45
Lone Wolf v. *Hitchcock*, 187 U. S. 553 ..... 45, 46
Mason v. *United States*, 260 U. S. 545 17
McFadden v. *Mountain View Min. & Mill. Co.*, 97 Fed. 670, reversed on other grounds, 180 U. S. 533 18
Medawakanton Indians v. *United States*, 57 C. Cls. 357 34
Seminole Nation v. *United States*, 92 C. Cls. 210, certiorari denied, 313 U. S. 563 46
Shoshone Tribe v. *United States*, 299 U. S. 476 ..... 13, 14, 46
Sioux Tribe of Indians v. *United States*, 84 C. Cls. 16, certiorari denied, 302 U. S. 740 9
Sioux Tribe of Indians v. *United States*, 85 C. Cls. 181, certiorari denied, 302 U. S. 717 9
Sioux Tribe of Indians v. *United States*, 86 C. Cls. 299, certiorari denied, 306 U. S. 642 9
Sioux Tribe of Indians v. *United States*, 90 C. Cls. 31 9
Spalding v. *Chandler*, 160 U. S. 394 ..... 14, 33
The Wichita Indians v. *United States*, 89 C. Cls. 378 14
United States v. *Ashton*, 170 Fed. 509, appeal dismissed, 220 U. S. 604 34
United States v. *Eaton*, 169 U. S. 331 40
United States v. *Harrison*, Equity No. 8288 (D. C. Utah), certified questions dismissed, sub nom., *United States* v. *McMahon*, 273 U. S. 782 19
United States v. *Klamath Indians*, 304 U. S. 119 13
United States v. *Leathers*, 26 Fed. Cas. No. 15,581 18
United States v. *Midwest Oil Co.*, 236 U. S. 459 ..... 10, 15, 16, 17, 18, 19, 20, 21, 34
United States v. *Payne*, 8 Fed. 883 ..... 18, 34
United States v. *San Francisco*, 310 U. S. 16 17

Cases—Continued.

	Page
United States v. *Santa Fe R. R. Co.*, No. 23, October Term 1941, decided December 8, 1941	13, 15
United States v. *Shoshone Tribe*, 304 U. S. 111	11, 13, 37
United States v. *Sturgeon*, 27 Fed. Cas. No. 16,413	18
Wilson, In re, 140 U. S. 575	18, 30, 31, 32
Wisconsin Railroad Co. v. *Price County*, 133 U. S. 496	17
Wolcott v. *Des Moines Co.*, 5 Wall. 681	17
Treaty:	
Fort Laramie Treaty of 1868, 15 Stat. 635	3, 7, 14, 44, 48
Agreements, Constitution and Statutes:	
U. S. Const., Art. IV, Sec. 3, cl. 2	15, 17
Act of February 21, 1863, c. 53, 12 Stat. 658	4
Act of March 3, 1863, c. 99, 12 Stat. 774	4
Act of July 27, 1868, c. 248, 15 Stat. 198	23
Act of March 3, 1873, c. 333, 17 Stat. 633	23
Act of April 15, 1874, c. 96, 18 Stat. 28	23
Act of June 22, 1874, c. 389, 18 Stat. 146	7
Act of March 3, 1875, c. 132, 18 Stat. 420	7, 23
Act of August 15, 1876, c. 289, 19 Stat. 176	7, 12, 40, 42, 57
Act of February 27, 1877, c. 69, 19 Stat. 240	38
Act of February 28, 1877, c. 72, 19 Stat. 254	8, 43, 46, 58
Act of February 8, 1887, c. 119, 24 Stat. 388	28
Act of March 2, 1889, c. 405, 25 Stat. 888	42, 47
Act of July 1, 1892, c. 140, 27 Stat. 62	23, 26
Act of February 20, 1893, c. 147, 27 Stat. 469	23, 27
Act of May 29, 1908, c. 216, 35 Stat. 444	23
Act of June 21, 1906, c. 3504, 34 Stat. 325	27
Act of June 30, 1919, c. 4, 41 Stat. 3	19, 22, 32
Act of February 25, 1920, 41 Stat. 437	18
Act of June 3, 1920, c. 222, 41 Stat. 738	9
Act of March 3, 1927, c. 299, 44 Stat. 1347	20, 22
Act of May 22, 1939, c. 140, 53 Stat. 752	38
R. S. Sec. 2139, 25 U. S. C., Sec. 241	5
Annual Reports, Commissioner of Indian Affairs:	
1872, p. 84	24
1876, p. 24	38
1877, pp. 236–245	22
1878, p. 58	24
1880, p. 18	25
1885, pp. 51–52	25
1886, p. 12	26
Miscellaneous:	
Cohen, *Handbook of Federal Indian Law* (1941), pp. 14–17, 66	22
Congressional Directory 1887–1889, p. 116	31
17 Cong. Rec. 1559, 1630, 1631, 1762–1763	19, 30
18 Cong. Rec. 191, 478, 772, 882	29, 31
67 Cong. Rec. 721	27

Miscellaneous—Continued.

	Page
67 Cong. Rec., pt. 10, pp. 10913–10921, 11381–11382, 11384, 11387	19, 27
Executive Order of January 11, 1875	3, 12, 15, 51
Executive Order of March 16, 1875	3, 12, 15, 51
Executive Order of May 20, 1875	3, 15, 52
Executive Order of November 28, 1876	3, 15, 52
Executive Order of August 9, 1879	54
Executive Order of January 4, 1883	15
Executive Order of March 20, 1884	56
Executive Orders Relating to Indian Reservations (1912), Vol. 1, pp. 5, 6, 10, 11, 13, 14, 18, 21, 22, 27, 30, 31, 35, 37, 44, 46, 48–50, 79, 111–112	23, 24
Executive Proclamation of February 10, 1890, 26 Stat. 1554	47
H. Rep. 708, 69th Cong., 1st Sess.	19, 27
Hearings on H. R. 9133, House subcommittee on Indian Affairs, 69th Cong., 1st Sess., pp. 21, 23–24, 28–29	19
Hearings on S. 3159 and S. 4152, Senate Committee on Indian Affairs, 69th Cong., 1st Sess., pp. 10–11, 13–14, 15, 18, 25–26, 27–28, 29–31, 33–34, 35, 48, 78–85	19
Hearings on S. 1722 and S. 3159, Senate subcommittee on Indian Affairs, 69th Cong., 1st Sess., pp. 104–105	19, 27
Kinney, *A Continent Lost—A Civilization Won* (1937), p. 198	31
14 Op. A. G. 181	19
17 Op. A. G. 258	19
29 Op. A. G. 239	27
34 Op. A. G. 171, 181	19, 33
S. 54, 49th Cong., 1st Sess.	29
S. Rep. 664, 52d Cong., 1st Sess., p. 2	26, 31
Sen. Doc. 9, 44th Cong., 2d Sess.	45


103°
South Fork
North Fork
Cannon Ball River
Ex. Order Nov. 28, 1876
Ex. Order, March 16 1875
102°
46°
Boundary Established by the Agreement of 1876
MISSOURI RIVER
Ex. Order January 11 1875
North Fork
Cheyenne River
TREATY OF 1868
MISSOURI RIVER
South Fork
Ex. Order May 20 1875
43°
103°
102°

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 798

THE SIOUX TRIBE OF INDIANS, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 20–30) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered April 7, 1941 (R. 30). A motion by the petitioner for a new trial was denied on October 6, 1941 (R. 30–31). The petition for a writ of certiorari was filed on December 12, 1941, and granted on February 9, 1942. The jurisdiction of this Court is invoked under Section 3 of the Act of

February 13, 1925, as amended by the Act of May 22, 1939.[1]

QUESTIONS PRESENTED

1. Whether Congress authorized the President to grant to Indian tribes beneficial ownership of portions of the public domain so as to render the United States liable to pay compensation upon reopening the lands for settlement.

2. Whether four executive orders setting aside portions of the public domain "for the use of" the Sioux Indians, executed for the purpose of suppressing liquor traffic with the Indians, attempted to grant to the Sioux such beneficial ownership as would render the United States liable to pay compensation upon reopening the lands for settlement.

3. Whether by the agreement of 1876 the Sioux Indians relinquished all claims to lands outside the permanent reservation defined in the treaty of 1868 and in that agreement.

TREATY, STATUTES, AND EXECUTIVE ORDERS INVOLVED

The relevant portions of the Fort Laramie Treaty of 1868 with the Sioux Indians are set forth in Appendix A, pp. 48–50, *infra*. The Executive Orders of 1875 and 1876 withdrawing from settlement the lands here involved are set forth in Appendix B, pp. 51–53, *infra*. The Executive

[1] c. 140, Stat. 752.

Orders of 1879 and 1884, restoring the lands to the mass of the public domain are set forth in Appendix C, pp. 54–56, *infra*. The material parts of the Act of August 15, 1876, appropriating monies for the subsistence of the Sioux and the material parts of the Agreement of 1876 made pursuant to that Act, are set forth in Appendix D, pp. 57–59, *infra*, together with a list of subsequent Acts appropriating monies for the subsistence of the Sioux in accordance with that agreement.

STATEMENT

The judgment under review (R. 30) dismissed a petition (R. 1–6) seeking to recover compensation for 5,667,016.74 acres of land alleged to have been granted to petitioner by four orders of the President in 1875 and 1876 and to have been "taken" by other executive orders issued in 1879 and 1884.

The material facts, as found by the Court of Claims, may be summarized as follows:[2]

The Treaty of 1868.—Article 2 of the Fort Laramie Treaty of 1868, 15 Stat. 635, between the United States and the Sioux Tribe set apart "for the absolute and undisturbed use and occupation"

---

[2] For the convenience of the Court a map has been placed inside the front cover of the brief. It shows the boundaries of the Great Sioux Reservation as established by the Treaty of 1868 and as changed by the Agreement of 1876. It also shows the lands included in the four Executive Orders of 1875 and 1876.

of the Tribe the Great Sioux Reservation described as follows:

> commencing on the east bank of the Missouri river where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river[1] * * *.

By the same article the Indians relinquished "all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided." By Articles 11 and 15 the Indians agreed to regard the reservation as their home and promised not to make permanent settlement elsewhere, although by Article 11 they reserved the right to hunt on lands north of the

[1] The existing reservations were the Winnebago and Crow Creek Reservations established pursuant to the Act of February 21, 1863, c. 53, 12 Stat. 658, and the Act of March 3, 1863, c. 99, 12 Stat. 774, 784–785 (R. 9). These reservations are the white areas shown on our map as lying just east of the Missouri River surrounded on three sides by the shaded area.

North Platte River. Article 16 designated the hunting ground as "unceded Indian territory" and the United States agreed not to permit white men to settle there.

The Executive Orders of 1875 and 1876.—By virtue of the treaty, the lands east of the Missouri River (except the Winnebago and Crow Creek Reservations shown in white on our map) and the lands north of the forty-sixth parallel (shown as a heavy dotted line on the map) became a part of the public domain. White men "infested" these lands, taking advantage of the easy access to the reservation to sell liquor to the Indians across the river. On January 8, 1875, the Commissioner of Indian Affairs recommended that the Secretary of the Interior request the President to withdraw from sale and set apart for Indian purposes a tract of approximately 5,600,000 acres along the east bank of the Missouri River. The Commissioner stated that the withdrawal was "necessary for the suppression of liquor traffic with the Indians." Accordingly, on January 11, 1875, the President signed an order directing that the described lands be "withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation."* (R. 8–9.)

* Such an addition to the reservation was necessary so as to make this portion of the public domain "Indian country," thus enabling the Government to punish not only the sale but also the introduction of liquor into the area. See R. S. Sec. 2139, 25 U. S. C., Sec. 241.

The Indian agents in the vicinity were advised of the reason for the withdrawal (R. 9). So also were settlers upon the land who were told that (R. 10):

> This order does not affect existing rights of any persons, residents within the limits of the Territory withdrawn, nor is it supposed that the withdrawal will be made permanent, or that any purchases will be made by the Government of property owned by individuals, in the tract of country withdrawn. There will be no interference with the legitimate business pursuits of any persons lawfully residing within the said limits.

Even after the order of January 11, 1875, had been issued, there remained open a few points along the river which afforded liquor dealers ready access to the reservation. Accordingly, on March 16, 1875, May 20, 1875, and November 28, 1876, upon the recommendations of the Commissioner of Indian Affairs and the Secretary of the Interior, three additional tracts aggregating a little over 1,000,000 acres were withdrawn from sale by executive orders and set apart "for the use of" the Indians (R. 10–14).

The Executive Orders of 1879 and 1884.—In 1879 the Commissioner of Indian Affairs concluded that most of the lands covered by the earlier orders could be reopened to settlement without endangering the interests of the Indians, provided that small tracts across the river from the Indian

agencies be excepted from the order of restoration (R. 15–16). Pursuant to this advice the President, on August 9, 1879, ordered that some 5,500,000 acres be "restored to the public domain" (R. 14–16). In 1884 the Commissioner concluded that the tracts near the agencies could properly be reopened and by the Executive Order of March 20, 1884, three tracts of about 105,000 acres were "restored to the mass of the public domain, the same being no longer needed for the purpose for which they were withdrawn from sale and settlement" (R. 17–19).

The Agreement of 1876.—Article 10 of the Fort Laramie treaty obligated the United States to furnish the Sioux subsistence of meal and flour for four years. After the obligation expired in 1873, Congress gratuitously appropriated in each of the years 1874, 1875, and 1876 over a million dollars for the subsistence of the Sioux.[5] The Act of August 15, 1876, c. 289, 19 Stat. 176, 192, however, provided that no further appropriation would be made unless the Sioux—

> shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight for said Indians; and also so much of their said permanent reservation

[5] See Act of June 22, 1874, c. 389, 18 Stat. 146, 167; Act of March 3, 1875, c. 132, 18 Stat. 420, 441; Act of August 15, 1876, c. 289, 19 Stat. 176, 192.

> as lies west of the one hundred and third meridian of longitude * * *.

Between September 23 and October 27, 1876, with a full understanding of the condition imposed by the Act of Congress, the various bands of Sioux signed an agreement, which was ratified by the Act of February 28, 1877, 19 Stat. 254 (R. 19). Article 1 thereof fixed a new northern and western boundary "of the reservation defined by article 2" of the treaty of 1868 so as to cede to the United States the territory west of the one hundred and third meridian,[7] and provided futher:

> * * * the said Indians do hereby relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described, including all privileges of hunting; and article 16 of said treaty [of 1868] is hereby abrogated.

---

[6] The important area to be surrendered was that part of the permanent reservation west of the one hundred and third meridian, for it embraced territory in the Black Hills in which gold had been discovered.

[7] Some lands west of the Missouri River and north of the original boundary to the reservation (shown on our map as a heavy dotted line) which had been withdrawn from the public domain by the Executive Order of March 16, 1875, were included in the territory added to the reservation by demarcation of the new northern boundary. It is for this reason that, although some 6,100,000 acres were withdrawn from settlement, the restoration orders of 1879 and 1884 include only about 5,600,000 acres. The Sioux ceded, in addition to the territory west of the one hundred and third meridian, a triangular territory between the north and south forks of the Cheyenne River.

This suit.—Under the jurisdictional act of June 3, 1920, c. 222, 41 Stat. 738, the Sioux Tribe filed on May 7, 1923, a petition in the Court of Claims asserting numerous claims against the United States. Subsequently the tribe was permitted to sever the various claims[*] and on May 7, 1934, it filed the separate petition upon which this case arises. The petition alleged that by the Executive Orders of 1875 and 1876 the Sioux became possessed of title in fee to the lands withdrawn (Par. V), and that the orders of 1879 and 1884 constituted a misappropriation of those lands (Par. VI). The petition prayed that just compensation be awarded for such taking (Par. VII).

Upon the foregoing findings of fact the Court of Claims concluded that petitioner had no interest in the lands in question (R. 20) and dismissed the petition (R. 30).

SUMMARY OF ARGUMENT

I

The Constitution vests in Congress power over the public domain and, except as Congress may delegate the power, the executive may not dispose of title to public lands.

---

[*] Decisions on some of the other claims have been made as follows: *Sioux Tribe of Indians* v. *United States*, 84 C. Cls. 16 (1936), certiorari denied, 302 U. S. 740; *Id.*, 85 C. Cls. 181 (1937), certiorari denied, 302 U. S. 717; *Id.*, 86 C. Cls. 299 (1938), certiorari denied, 306 U. S. 642; *Id.*, 89 C. Cls. 31 (1939).

A. In *United States* v. *Midwest Oil Co.*, 236 U. S. 459, the Court held that congressional, executive, and judicial practice had so long supported executive orders temporarily setting aside portions of the public domain for public purposes that Congress might fairly be said by its acquiescence to have impliedly delegated such power to the President. Consequently, the four orders here involved undoubtedly were effective to set aside the described lands as "Indian Country" or as an "Indian Reservation," for so long as the orders were unrevoked. But there is a great difference between determining how public lands shall be used from time to time and permanently alienating the beneficial ownership; and the fact that Congress impliedly delegated, and the President exercised, administrative control falls far short of establishing that Congress delegated, or the President ever sought to exercise, power of permanent disposition.

B. In contrast with the situation as to temporary withdrawals involved in the *Midwest Oil* case, the history of executive, congressional, and judicial practice in respect to beneficial ownership of executive order reservations requires the conclusion that Congress has never impliedly delegated its power to make permanent dispositions of the public domain. The President never purported to exercise such power; on the contrary he has always regarded executive order reservations not based on statute or treaty as revocable. Congress never assumed that it had

delegated the power; on the contrary, it several times declared that executive orders creating Indian reservations did not permanently alienate the beneficial ownership or the right to use and occupation. The courts were never squarely faced with the question and expressed various opinions. In short, long continued executive and legislative practice, not denied by the courts, held that the executive could make only temporary dispositions always subject to his control and to the overriding decisions of Congress.

We submit, therefore, that Congress did not delegate power to alienate portions of the public domain and that the President lacked authority to confer upon the Sioux ownership of the lands in question.

II

Read in the background we have delineated, the four executive orders did not attempt to grant ownership to the Sioux but simply set aside the described portion of the public domain for their use until such time as it should be otherwise disposed of. The orders did not contain words of art with an unalterable meaning. See *United States* v. *Shoshone Tribe,* 304 U. S. 111, 116. The recommendations of the Commissioner of Indian Affairs and Secretary of the Interior, upon the basis of which the orders were drawn and executed, show clearly that the sole purpose was to curb the illicit whiskey traffic. It would

have been an extraordinary measure for the President to check this evil by a permanent gift of the beneficial ownership of more than 6,000,000 acres of the public domain when he could accomplish the same purpose by making a temporary withdrawal. The officers charged with the responsibility of administering the orders interpreted them to be temporary. The Commissioner of Indian Affairs in 1875 twice advised settlers that it was not intended to interfere with their existing occupancy and lawful pursuits (R. 10). On one of those occasions he also stated that it was not "supposed that the withdrawal will be made permanent" (R. 10). Subsequent legislation and agreements negotiated with the Sioux show that neither Congress nor the Sioux interpreted the executive orders as granting to the Sioux any rights in the lands in question.

III

In 1876, after three of the executive orders had been issued, the Sioux executed an agreement redefining "the northern and western boundaries of the reservation defined by article 2 of the treaty" of 1868 and relinquishing all claims to "the territory outside said reservation." By this agreement the Sioux released whatever rights they may have acquired under the first three executive orders.

ARGUMENT

Although fee simple title to Indian lands is usually held by the United States, the right of

an Indian tribe to permanent and exclusive use and occupation constitutes beneficial ownership for all practical purposes. *United States* v. *Shoshone Tribe,* 304 U. S. 111, 115–117. If lands so belonging to an Indian tribe are "taken" by the United States, the Indians are entitled to just compensation. *Shoshone Tribe* v. *United States,* 299 U. S. 476, 497; *United States* v. *Klamath Indians,* 304 U. S. 119, 125.

By the Fort Laramie Treaty of 1868 the Sioux relinquished all claim to lands outside the Great Sioux Reservation defined by the treaty, and agreed not to make a permanent home elsewhere (Arts. 2, 11, 16). This agreement bars any claim to beneficial ownership of the lands in question upon the basis of aboriginal use and occupation. Hence, although it quotes at length from the decision in *United States* v. *Santa Fe R. R. Co.,* No. 23, October Term 1941, decided December 8, 1941, we do not understand that petitioner presses the present claim upon such a basis.*

* In *United States* v. *Santa Fe R. R. Co., supra,* the Court held that an Indian tribe might claim beneficial ownership good against a private person upon the basis of ancestral rights resulting from aboriginal use and occupation. No question was involved as to whether a claim good against the United States might be based upon aboriginal use and occupation. The Court of Claims has several times decided that in the absence of treaty recognition or confirmation mere aboriginal possession will not ground a claim for compensation against the United States.

452222—42——3

Indian tribes have beneficial ownership where the United States has granted them the right of permanent use and occupation by statute or treaty. See *e. g., Shoshone Tribe* v. *United States,* 299 U. S. 476. In the present case, however, it is not suggested that any statute or treaty conveyed to the Sioux the lands in question.

Another basis for claiming beneficial ownership which we may also lay aside in the present case as irrelevant, is an executive order establishing an Indian reservation pursuant to a statute or treaty provision. See, *e. g., Donnelly* v. *United States,* 228 U. S. 243; *Spalding* v. *Chandler,* 160 U. S. 394, 402. For the purposes of the present case we need not consider whether the Indian tribes affected by any such executive order held beneficial ownership of this type of executive order reservation. No statute or treaty authorized the President to establish an additional Sioux reservation or to change the boundaries of the treaty reservation. It is true that Article 2 of the Fort Laramie Treaty provided that "no persons * * * shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the

---

Duwamish et al. Indians v. *United States,* 79 C. Cls. 530, 597–603, certiorari denied, 295 U. S. 755; *Coos Bay Indian Tribes* v. *United States,* 87 C. Cls. 143, 152–153, certiorari denied, 306 U. S. 653; *The Wichita Indians* v. *United States,* 89 C. Cls. 378, 416.

use of said Indians;" but this provision recognizing that additional lands might be granted did not affect the division of authority within the Government by authorizing the President to take such action. Any additions, of course, would have to be made in accordance with Article IV, Section 3, of the Constitution.

For the foregoing reasons, no doubt, petitioner rests its claim upon the ground that beneficial ownership may be acquired in still another way—by executive order unaided by statute or treaty. Petitioner argues (1) that although the President lacked express statutory or treaty authority, he had implied power to dispose of the lands in question, and that the existence of such power was recognized in *United States* v. *Midwest Oil Co.*, 236 U. S. 459; and (2) that the four executive orders of 1875 and 1876 were intended to, and did, convey to the Sioux beneficial ownership. Thus, there is raised one phase of the general and much discussed question of the status of Indian reservations established by executive order.[10]

---

[10] Reference is made to the pertinent authorities in the course of our argument. It is appropriate to point out here, however, that *United States* v. *Santa Fe R. R. Co.*, *supra*, did not involve any question as to what rights were acquired by the Walapai Tribe under the Executive Order of President Arthur, January 4, 1883. The United States was held entitled to an accounting as respects those lands within the reservation to which the Walapai could prove aboriginal use and occupation, and the cause of action was held to depend upon that proof.

In considering the status of executive order reservations we discuss, first, the power of the President to withdraw lands from the public domain for Indian uses, a power sustained in the *Midwest Oil* case and in other cases, and we show that those decisions do not hold that the President had power to grant an irrevocable title to the Indians. Second, we review the history of executive order reservations and show that the executive and legislative branches long regarded executive order reservations as revocable at the will of the President or the Congress, thus establishing that Congress did not impliedly delegate to the President power to alienate any part of the public domain to the Indians. Third, we show that, regardless of the power of the President, the four orders in question, read in the general background of executive practice and in the light of the peculiar circumstances requiring their issuance, did not confer irrevocable rights upon the Sioux. Finally, we point out that after the issuance of three of these orders, Congress and the Sioux agreed that the Sioux should have no claim to lands outside their original reservation, thus affording a practical construction of the executive orders and releasing any rights those orders might have been thought to carry.

I

THE PRESIDENT DID NOT HAVE POWER TO CONVEY TO THE SIOUX THE LANDS IN QUESTION

A. THE POWER OF THE PRESIDENT TO MAKE TEMPORARY WITHDRAWALS FROM THE PUBLIC DOMAIN DID NOT INCLUDE THE POWER TO CONVEY BENEFICIAL OWNERSHIP

Plenary power to dispose of the lands of the United States rests exclusively in Congress. U. S. Const. Art. IV, Sec. 3, cl. 2; *Gibson* v. *Chouteau*, 13 Wall. 92, 99; *Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496, 504; *United States* v. *San Francisco*, 310 U. S. 16, 29. For many years, however, the President made orders without statutory authority setting aside portions of the public domain for particular public purposes and thus closing the lands to settlement. From time to time the Court sustained his action. *E. g. Grisar* v. *McDowell*, 6 Wall. 364; *Wolcott* v. *Des Moines Co.*, 5 Wall. 681. Finally, in *United States* v. *Midwest Oil Co.*, 236 U. S. 459, the Court held that in aid of proposed legislation for conservation the President, by proclamation, could effectively withdraw oil lands in the public domain from all forms of location, settlement or entry. Accord: *Mason* v. *United States*, 260 U. S. 545. The Court broadly sustained the power of the President, even in the absence of express statu-

tory authority, to withdraw lands from settlement and reserve them for particular public uses, such as Indian reservations, military reserves and bird reserves, holding that Congress had impliedly sanctioned the executive's exercise of this authority by uniformly and repeatedly acquiescing in his long continued practice of making such withdrawals.

Prior to the *Midwest Oil* case there had been a number of decisions recognizing that the President could effectively withdraw for Indian purposes portions of the public domain. Thus, it was held that an executive order reservation was "Indian country" within the criminal statutes. *United States* v. *Leathers,* 26 Fed. Cas. 15,581; *United States* v. *Sturgeon,* 27 Fed. Cas. 16,413. Compare *In Re Wilson,* 140 U. S. 575; *United States* v. *Payne,* 8 Fed. 883 (W. D. Ark. 1881). And the Circuit Court of Appeals for the Ninth Circuit twice decided that an executive order was as effective as a treaty to exclude settlers from intrusion, and to forbid the location of mining claims, upon the land which the order set apart as an Indian reservation. *McFadden* v. *Mountain View Min. & Mill. Co.,* 97 Fed. 670 (C. C. A. 9) reversed on other grounds, 180 U. S. 533; *Gibson* v. *Anderson,* 131 Fed. 39 (C. C. A. 9). After the *Midwest Oil* decision Attorney General Stone gave his opinion that executive order reservations were not a part of the "public domain" and so not subject to leasing under the Leasing Act of February 25, 1920 (41 Stat. 437)

34 Op. A. G. 171. *Contra: United States* v. *Harrison,* District Court of the United States for the District of Utah, Equity No. 8288, certified questions dismissed, sub. nom. *United States* v. *McMahon,* 273 U. S. 782.[11]

In view of these decisions, and particularly the decision in the *Midwest Oil* case, it cannot now be doubted that the President had power to create revocable Indian reservations by executive order, until Congress in 1919 forbade the withdrawal of public lands for that purpose except by Act of Congress.[12] Act of June 30, 1919, c. 4, 41 Stat. 3,

[11] Pursuant to the opinion of Attorney General Stone the oil lands in executive order reservations were closed to leasing and in 1926 there were hearings and debates on various bills to provide for leasing such lands. In both the hearings and the debates the status of executive order reservations was earnestly debated. See 67 Cong. Rec. 10913–10921, 11381–11382, 11384, 11387; Hearings on S. 3159 and S. 4152, Senate Committee on Indian Affairs, 69th Cong., 1st Sess., pp. 10–11, 13–14, 15, 18, 25–26, 27–28, 29–31, 33–34, 35, 48, 78–85; Hearings on S. 1722 and S. 3159, Senate Subcommittee on Indian Affairs, 69th Cong., 1st Sess., pp. 52, 62–63, 70–71, 72–77, 80–82, 83, 91–92, 93–94, 97–98, 104–105; Hearings on H. R. 9133, House Subcommittee on Indian Affairs, 69th Cong., 1st Sess., pp. 21, 23–24, 28–29; H. Rep. 763, 69th Cong., 1st Sess.

[12] In 1882 Attorney General Brewster advised that the President had authority to make another reservation for the Sioux (not here involved) by executive order. See 17 Op. A. G. 258. Senator Dawes later spoke of this executive order reservation, which was established for the same reasons as those here involved, as a "mere police regulation" conferring no rights on the Indians. 17 Cong. Rec. 1631. For an earlier opinion denying the power of the President to establish reservations by executive order, see 14 Op. A. G. 181.

34. See also Act of March 3, 1927, c. 299, Sec. 4, 44 Stat. 1347. The lands set aside by executive orders for the use of the Sioux as additions to the permanent treaty reservation were, therefore, lawful reservations during the period in which the executive orders were effective.

But the power of the President temporarily to withdraw portions of the public domain from entry or location for particular public uses cannot be taken as a power in the President permanently to dispose of portions of the public domain and thereby grant beneficial ownership good against the United States. The *Midwest Oil* decision rested upon this very distinction. The opinion emphasized the fact that the executive withdrawals were temporary and subject to disaffirmance. Speaking of the Indian reservations, military reservations, and bird reserves established by executive order, the Court said (236 U. S. at 471):

> But when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain, nothing was more natural than to retain what the Government already owned. * * * The President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location; *his action* inflicted no wrong upon any private citizen, and *being subject to disaffirmance by Congress, could occasion no harm to the*

> *interest of the public at large*, Congress did not repudiate the power claimed or the withdrawal orders made. * * * [Italics supplied.]

The *Midwest Oil* case, therefore, does not sustain petitioner's claim of ownership through executive orders, and, for like reasons, the cases sustaining the executive power to withdraw land from the public domain for the use of the Indians, are to be distinguished. This is not to say that Congress could not delegate a power to make permanent disposition. The question whether Congress has made such an additional delegation must, however, be separately investigated. In the next section of this brief, therefore, we turn to the history of executive order reservations to consider whether in fact there was an implied delegation of a power of alienation or whether the executive authority was limited to a power of temporary withdrawal.

B. CONGRESS NEVER DELEGATED TO THE PRESIDENT, AND THE PRESIDENT IN FACT NEVER ATTEMPTED TO EXERCISE, POWER TO GRANT TO INDIAN TRIBES BENEFICIAL OWNERSHIP OF PORTIONS OF THE PUBLIC DOMAIN

The history of the use of executive orders to set aside Indian reservations without express statutory or treaty authority shows affirmatively that the President and Congress distinguished, as we have done, between a withdrawal for Indian use and an irrevocable grant of beneficial ownership, and thus establishes that Congress did not

impliedly delegate to the President any authority to convey ownership of public lands to the Indians.

The practice of withdrawing portions of the public domain for Indian reservations by executive action commenced about 1855, but the orders were relatively infrequent prior to 1871 when the practice of dealing with the Indians by treaty ended. See Cohen, *Handbook of Federal Indian Law* (1941), pp. 14–17, 66. During the following years when the Indians were being settled and resettled on western reservations, the withdrawal of public lands by executive orders occurred so regularly that the Annual Report of the Commissioner of Indian Affairs for 1877 listed (pp. 236–245) "Executive Orders, Establishing, Enlarging or Reducing Indian Reservations, also Restoring Certain Indian Reservations to the Public Domain." Similar compilations appeared in each annual report up to 1887. The President continued to exercise this power until the Act of June 30, 1919, c. 4, Sec. 27, 41 Stat. 3, 34, which provided that the public lands should not be withdrawn for an Indian reservation except by Act of Congress. Finally, the Act of March 3, 1927, c. 299, Sec. 4, 44 Stat. 1347, provided that changes in the boundaries of executive order reservations should not be made except by Act of Congress.

During the period in which executive orders were used to establish or alter reservations approximately 150 executive orders were issued with-

drawing some 150,000,000 acres from the public domain. In some 53 instances the executive department ordered lands that had been previously withdrawn restored to the public domain either to abolish a reservation, to reduce its size, or to make it available to another tribe of Indians. See e. g. Executive Orders Relating to Indian Reservations (1912) vol. 1, pp. 5, 6, 10, 11, 13, 14, 18, 21, 22, 27, 30, 31, 35, 37, 44, 46, 48–50. It has not been possible to calculate the acreage restored. Similarly, Congress has, in several instances, restored to the public domain lands withdrawn by executive order, either directly or by instructions to the President to make the restoration. Acts of July 27, 1868, c. 248, sec. 6, 15 Stat. 198, 223; March 3, 1873, c. 333, 17 Stat. 633; April 15, 1874, c. 96, 18 Stat. 28; March 3, 1875, c. 132, 18 Stat. 420, 445;[11] July 1, 1892, c. 140, 27 Stat. 62; February 20, 1893, c. 147, 27 Stat. 469; May 29, 1908, c. 216, sec. 25, 35 Stat. 444, 457. This long practice of establishing, modifying, and abolishing Indian reservations by executive order was founded on the understanding—shared by the Executive and Congress, and not denied by the courts—that the Indians were mere tenants at will and not the beneficial owners of such reservations.

1. *The Executive.*—During the time it was exercising the power of withdrawing from, and re-

[11] See Executive Orders Relating to Indian Reservations (1912) vol. 1, pp. 111–112.

storing lands to, the public domain, the executive on several occasions stated the effect of the orders of withdrawal. One of the earliest withdrawals was made in 1855 upon recommendation of the Secretary of the Interior that it should be made upon the express condition "that no peculiar or exclusive claim to any land so withdrawn can be acquired by said Indians, for whose future benefit it is understood to be made, until after they shall by future legislation be invested with the legal title thereto". Executive Orders Relating to Indian Reservations (1912) vol. 1, p. 79. Plainly the executive department so construed all such orders for in his annual report for 1872 the Commissioner of Indian Affairs stated (p. 84):

> In addition to the above, 40,000 Indians having no reservations secured to them by treaty have had reservations set apart for them by Executive order out of the public lands of the United States. The number of reservations thus set apart is 15, aggregating 59,544 square miles. *The Indians thus located, however, have, in the nature of the case, no assurance for their occupation of these lands beyond the pleasure of the Executive.* [Italics supplied.]

In his annual report for 1878 the Commissioner summarized the rights of the Indians on various reservations saying (p. 58): "The occupants of reservations created by executive order, or by direction of the Secretary are mere tenants at will,

and possess no permanent rights to the lands upon which they are temporarily permitted to remain." Again, in his annual report for 1880, when discussing railroad rights-of-way through Indian reservations, the Commissioner said (p. 18):

> * * * there is another class of cases [in addition to cases of treaty or statutory reservations] where railroads pass through reserves which have been created by executive order and in which the Indians are mere tenants at will, possessing no permanent right to the lands upon which they are temporarily permitted to remain.

In April, 1885, a Presidential proclamation was signed cancelling an order of February, 1885, which restored certain lands to the public domain because the lands involved had been set aside for the Sioux by the Fort Laramie Treaty and "consequently being treaty reservations the Executive was without lawful power to restore them to the public domain by said Executive Order." Annual Report, Comm'r of Ind. Aff. (1885), pp. 51–52. The Commissioner of Indian Affairs reported that he had steadfastly maintained that those lands belonged to the Sioux as part of the Treaty reservation, an attitude again emphasizing that he distinguished the rights of Indians under treaties from their rights under executive orders.

The next year the Commissioner restated his view that executive orders did not convey title to

the Indians (Annual Report, Comm'r of Ind. Aff. (1886), p. 12):

> The reservation of the Cheyennes and Arapahoes is simply set aside by executive orders and the Indians occupying this tract do not hold it by the same tenure with which Indians in other parts of the Indian Territory possess their reserves.

2. *Congress.*—We have already referred to the fact that Congress several times restored to the public domain lands set aside by executive order as Indian reservations. (See p. 23, *supra.*) By this action Congress clearly showed that it had not authorized the President to grant such lands to the Indians irrevocably. One such restoration was made by the Act of July 1, 1892, c. 140, 27 Stat. 62, which restored to the public domain about 1,500,000 acres of the Colville reservation, established by executive order of President Grant in 1872. In reporting the bill the Senate Committee on Indian Affairs stated (S. Rep. 664, 52d Cong., 1st sess., p. 2):

> This executive order defines the Colville Reservation as it now exists, and is the sole basis upon which the right of occupancy of these Indians rests. Under this order the Indians were given a license to occupy the lands described in it so long as it was the pleasure of the Government that they should do so, and no right, title, or claim to such lands has vested in the Indians by virtue of this occupancy.

It is true that Section 2 of the Act required the proceeds of the sale to be set aside and that Congress ultimately directed them to be paid to the Indians [14] but to draw any inference that Congress thereby recognized the Indians as owners of the land would be contrary to the express words of Section 8 of the Act, which provided:

> That nothing herein contained shall be construed as recognizing title or ownership of said Indians to any part of said Colville Reservation, whether that hereby restored to the public domain or that still reserved by the Government for their use and occupancy.[15]

The next year, a provision to the same effect was included in the Act of February 20, 1893, Sec. 5, c. 147, 27 Stat. 469, which restored to the public domain a portion of the White Mountain Apache Indian Reservation previously established by a series of executive orders.[16]

---

[14] Act of June 21, 1906, c. 3504, 34 Stat. 325, 377.

[15] See Senate debates on the effect of these acts, in 67 Cong. Rec. 721, 10917.

[16] Section 4 of this Act also set aside for the Indians the proceeds of sales of the lands restored after deduction of expenses. And see H. Rep. 763, 69th Cong., 1st Sess., p. 5. See 29 Op. A. G. 239 for a discussion of this Act in which the question of title is mentioned without a definite expression of opinion. However, the practice appears to have been not to make payments for reopening executive order reservations. See Hearings before a Subcommittee of the Committee on Indian Affairs on S. 1722 and S. 3159, 69th Cong., 1st Sess., pp. 104–105.

Section 1 of the General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388, is not, as petitioner asserts (Br. 16–17), inconsistent with this Congressional understanding of the effect of executive orders withdrawing lands from the public domain for Indian purposes. Section 1 provides:

> That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and, he hereby is, authorized * * * to cause said reservation * * * to be surveyed * * * and to allot the lands in said reservation in severalty * * *.

By this section Congress authorized the President to grant lands in executive order reservations to individual Indians in the event that the reservation was allotted in severalty. Congress mentioned executive order reservations only in defining the lands as to which the President should have discretion in making allotments. It did not grant any beneficial interest in unallotted lands to the tribes or recognize the Indians as holding any legal rights in executive order reservations until the lands were allotted. In the present case, moreover, the Allotment Act cannot aid petitioner. The lands in question were restored to the public domain before the Act was enacted. By no stretch of interpretation could the Act be said to

grant to the Indians beneficial ownership of executive order reservations already abolished.

Section 5 of the Act shows affirmatively that Congress believed that the Indian tribes had never had and did not acquire by the Act any title or interest in executive order reservations. Section 5 authorizes the Secretary of the Interior to negotiate for the release of lands not needed for allotment "in conformity with the treaty or statute under which such reservation is held" but makes no mention of executive order reservations. The only reasonable explanation which we can assign for this omission is that Congress believed a release to be unnecessary in the case of executive order reservations because, as the Commissioner for Indian Affairs had repeatedly stated (see pp. 24–26 *supra*), the Indian tribes had no rights in such reservations.

The legislative history of the Allotment Act clearly supports this view. As it passed the Senate the bill (S. 54, 49th Cong., 1st Sess.) contained a preliminary section authorizing the President to issue patents to Indian tribes occupying the reservations created "by virtue of treaty stipulations or an Act of Congress."[17] As Senator Dawes explained, executive order reservations were excluded from this provision because the

[17] This section was stricken from the bill only because it was thought by the House Committee that "the time had passed for the issuance of tribal patents." 18 Cong. Rec. 191, 772, 882.

tribal title did not apply thereto. 17 Cong. Rec. 1630. Throughout the debate Senator Dawes contrasted the public ownership of executive order reservations with the Indian title to statutory and treaty reservations and the Senate accepted the distinction (17 Cong. Rec. 1559, 1631, 1762–1763). He pointed out (17 Cong. Rec. 1630):

> An executive order reservation is public land set apart temporarily for an Indian reservation.

It is true that contrary expressions of opinion can be found. In 1890 Assistant Attorney General Shields advised the Secretary of the Interior that the Indian tribes might have title to executive order reservations. See *C. N. Cotton*, 12 L. D. 205, 206–207. In 1891, in *Re Wilson*, 140 U. S. 575, 577, the Court said that the effect of the Allotment Act "was to confirm the executive order [setting aside the White Mountain Apache Reservation], and establish beyond challenge the Indian title to this reservation." But the statement must be limited to the decision in the case. The petitioner was arguing that by surrendering a part of its jurisdiction of "Indian Country" to the Territory of Arizona, the United States had deprived the district courts of all jurisdiction over crimes committed in "Indian Country" in that Territory. The United States was arguing that the district court retained the unsurrendered jurisdiction over crimes committed in "Indian

Country." Thus, the duration or revocability of the rights of the Indians was not before the Court but only the question of whether this was, as both parties conceived, "Indian Country" while the executive order was outstanding.

Moreover, we have today additional material not available when the opinions noted above were expressed. Shortly after the decision in *Re Wilson*, the Senate Committee on Indian Affairs in its report on the Act of July 1, 1892, restoring part of the Colville Reservation to the public domain, stated the meaning of the Allotment Act as applied to executive order reservations (S. Rep. 664, 52d Cong., 1st Sess., p. 2):[18]

> An erroneous idea seems to have grown up, that the Indian allotment act and its amendments have given additional sanctions to executive reservations, and operated to confer titles upon the Indians occupying them they did not before possess. * * * At the time of the enactment of this statute, there were fifty-six executive reserva-

[18] Of the nine members of this committee, six—Senators Dawes, Plant, Stockbridge, Morgan, Jones, and Daniel—had been on the committee when the General Allotment Act was passed and Senators Dawes and Jones had been members of the Senate conference committee on the 1887 Act. See 18 Cong. Rec., pt. 1, p. 478; Congressional Directory, 1887–1889, p. 116; *Id.*, 1891–1892, p. 116. Senator Dawes was probably the most prominent legislator of this period upon Indian Affairs and the General Allotment Act is generally known as the "Dawes Allotment Act." Kinney, *A Continent Lost—A Civilization Won* (1937), p. 198.

tions, embracing perhaps from 75,000,000 to 100,000,000 acres of the public lands, in which the Indians had no right or claim of title and which could be extinguished by act of the President. It would be preposterous to place such a construction upon the language of this act as would divest the United States of its title to these lands. * * *[19]

3. *The Courts.*—In the period in which executive orders setting aside Indian reservations were being issued there were few occasions on which the courts were required to consider the status of such reservations. Occasionally the authority of the President to withdraw lands from the public domain was recognized in decisions holding that the lands became "Indian country" closed to settlement and location. See cases cited pp. 17–18, *supra.* Twice, this Court expressed the opinion that the Indian tribes had "title" to the lands set aside by executive order. The first occasion was in *Re Wilson,* a decision which we have already dis-

[19] Petitioner is not aided by Section 27 of the Indian Appropriation Act of June 30, 1919, c. 4, 41 Stat. 3, 34. That Section provided: "That hereafter no public lands of the United States shall be withdrawn by Executive Order, proclamation, or otherwise, for or as an Indian reservation except by act of Congress."

Petitioner argues (Br. 17) that the enactment of this Section amounts to a recognition of the prior practice of establishing Indian reservations by executive order. Of course, there is no doubt of Congressional recognition of the practice but the argument overlooks the distinction between withdrawal of land from the public domain and divestiture of the Government's beneficial ownership and title.

cussed. (See pp. 30–31, *supra*.) Later, in *Spalding* v. *Chandler*, 160 U. S. 394, 403, it was said that when reservations were created, the Indians acquired the "same character of title," whether the reservation was created by treaty or executive order; but the issue was whether an executive order duly authorized to carry out a treaty was effective to close the lands to settlement.[20] On each occasion, therefore, the Court was speaking only of the right of the Indians while the executive orders were in force and on neither occasion did the Court have before it any question as to the duration of the Indians' rights in executive order reservations.[20a]

While the inferior courts recognized the effectiveness of executive orders to establish reservations, they pointed out that such orders did not

---

[20] These opinions have not been thought to foreclose the question of title to executive order reservations. See 34 Op. A. G. 171, 176.

[20a] It is significant in this connection that in *Spalding* v. *Chandler*, *supra*, Mr. Justice White spoke of the rights of the Indians in lands which they originally occupied as a "title and right to the perpetual occupancy of the land" as contrasted with a fee and then, in speaking of reservations created by treaty or executive order, said that the Indians held by "the same character of title, to wit, the right to possess and occupy," without mentioning the duration of the "title." 160 U. S. 402–403. The fact that the Court in this case was not considering whether the Indians had any irrevocable rights is emphasized later in the opinion where it is said "Private rights could not, without the authority of Congress, be acquired in the tract during the occupancy of the reservation under the treaty." 160 U. S. 404–405.

grant rights as against the United States. For example, in *United States* v. *Payne*, 8 Fed. 883 (W. D. Ark. 1881), the court said that even in creating reservations by treaty the Indians were not always granted ownership (p. 888):

> The sovereign is not parting with the title, but only setting it [the reservation] apart to be used for a specific public purpose. * * *

And in *United States* v. *Ashton*, 170 Fed. 509 (C. C. W. D. Wash. 1909), appeal dismissed 220 U. S. 604, it was said (p. 519):

> * * * the executive orders making a reservation of public land for use of the Indians were not irrevocable, nor in any sense a grant of title.[21]

The executive and Congressional understanding of the effect of executive orders creating reservations shows that Congress did not by implication delegate to the President its otherwise exclusive power to alienate portions of the public domain. The court decisions do not deny this conclusion. Such implied delegation could be spelled out only by executive assertion of the power and Congressional acquiescence. Cf. *United States* v. *Midwest Oil Co., supra.* The history which we have re-

---

[21] The Court of Claims took a similar view in *Medawakanton Indians* v. *United States*, 57 C. Cls. 357 (1922). Speaking of Indians settled by President Grant on an executive order reservation (p. 368), the Court found as a fact that (p. 370)—

"They were occupying the reservation at Niobrara, subject to the will of the President * * *."

viewed shows that the President never sought or intended to exercise such power but, on the contrary, that he believed reservations established by executive order to be subject to alteration or revocation. Congress, taking the same view both implicitly and explicitly, itself reopened executive order reservations to settlement. What is most important, during the years in which Indians were being settled on executive order reservations, the executive branch repeatedly advised Congress through the reports of the Commissioner of Indian Affairs that the executive orders granted only the use of the lands subject to the will of the President. The limitation was a realistic one in the administration of the public domain for it was one thing for the President to use land for particular public purposes always subject to disaffirmance by Congress or himself and quite another, to create adverse interests. (See pp. 20–21, *supra*.) Congressional acquiescence and any implied delegation of power must, therefore, have been limited to the power of making withdrawals for public purposes and subject to change or revocation. The President had no power to convey to the Sioux beneficial ownership of the lands in question.

II

THE EXECUTIVE ORDERS OF 1875 AND 1876 DID NOT PURPORT TO GRANT BENEFICIAL OWNERSHIP TO THE SIOUX

We have shown that the President and the executive officers responsible for Indian affairs

regarded executive orders not as grants, but as temporary measures subject to revocation or alteration. We urge that this was the consistent executive practice and that Congress knew and accepted it, and did not delegate to the President, or recognize that he had, any greater authority. But even if we view the case most favorably to petitioner and assume an implied delegation of power to the President, nevertheless the executive and congressional practice shows at the very least that executive orders creating reservations were not *uniformly* intended to grant title to the Indians. To illustrate, surely it cannot be said that President Grant considered that he was granting Indian tribes beneficial ownership in every reservation that he established by executive order while at the same time his Commissioner for Indian Affairs was declaring that such orders gave no rights to the Indians save that of occupancy at the will of the Government. (See pp. 24–26, *supra*.) Consequently, if we assumed for purposes of argument that the President had power to grant ownership, it would then become a question in each instance whether the order belonged in the class of orders granting title or in the class simply withdrawing the land from settlement. Considered against the background of executive practice, there can be little doubt that the four orders here in question were temporary withdrawals.

The orders directed that the lands be "withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation" (R. 9, 11, 12, 14). There is no compulsion to read these words as conveying beneficial ownership. Petitioner relies on the word "use" but agrees, as it must, that the word is not to be regarded in a technical sense (Br. 21). It must be read "having regard to the purpose of the arrangement made." *United States* v. *Shoshone Tribe*, 304 U. S. 111, 116.

As the findings make plain, the President's purpose in setting the lands aside for the "use" of the Sioux was to make the lands along the east bank of the Missouri River part of the "Indian Country" in order to protect the inhabitants of the adjoining reservation from liquor sellers (see pp. 5–6 *supra*). It made little difference to the accomplishment of the purpose whether the lands were added to the Sioux or some other reservation and, in fact, the recommendation upon which the second order was based suggested merely that the remaining points of access along the Missouri River, not theretofore embraced in any Indian or military reservation, be added to some reservation (R. 46–47). Accordingly, as the Court of Claims found, when these lands "were no longer needed for the purpose for which they had been withdrawn from sale," they were restored to the pub-

lic domain by the orders of 1879 and 1884 (R. 19; see also R. 18).[22]

Petitioner, without challenging the court's findings or complaining of the failure to make additional findings,[23] seemingly contends (Br. 2, 20–24) that the Executive Orders were issued not only to suppress the liquor traffic but also to augment the treaty reservation in order to protect members of the tribe occupying the 6,000,000 acres withdrawn. There is no warrant for the assertion. The evidence excerpted by petitioner from the rec-

---

[22] Petitioner's contention that the administrative authorities misconstrued the law prohibiting sale of liquor to the Indians (R. 24–26) is immaterial. The record shows that the law did not enable him to deal effectively with the liquor traffic when the lands were withdrawn from settlement (R. 14–19) and that he assented to their reopening because he believed there had been a change in the applicable statutes (R. 55–59). Moreover, the administrative construction of the Revised Statutes, which was thought to require the addition of these lands to the "Indian country" in order to deal with the liquor problem, was based upon court decisions and led the Commissioner to "strongly recommend" a change in the law. Annual Report, Commissioner of Indian Affairs, 1876, p. xxiv. And Congress made such change by the Act of February 27, 1877, c. 69, 19 Stat. 240, 244.

[23] Since petitioner does not specify as error the failure to make additional findings nor complain of the findings made (Br. 10–12), it has not brought itself within the Act of May 22, 1939, c. 140, 53 Stat. 752, giving this Court, in cases from the Court of Claims, authority to review "errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

ord (R. 32–34) at most indicates that some members of the Yanktonai band were occupying a few patches of bottom land along the east bank of the Missouri River in violation of the Fort Laramie treaty. There is nothing to show that either the Commissioner of Indian Affairs or the Secretary of the Interior or the President had the Yanktonai band in mind when the executive orders were issued and it cannot be assumed that they were moved by any other purpose than that which is set forth in the recommendations upon which the orders were issued.

Consistently with the limited purpose to make the lands "Indian country" to the extent necessary to check the liquor traffic, the officers charged with the responsibility of administering the executive orders interpreted them to be temporary. The Commissioner of Indian Affairs in 1875 twice advised settlers within the territory embraced by the initial order that it was not intended to interfere with their existing occupancy and their lawful pursuits (R. 10). On one occasion he stated (R. 10):

> This order does not affect existing rights of any persons, residents within the limits of the Territory withdrawn, *nor is it supposed that the withdrawal will be made permanent.* [Italics supplied.]

Later, upon directions from the Secretary of the Interior, he instructed the agents to restrain the Indians from molesting settlers on lands covered by the order (R. 10). These steps are inconsistent

with a purpose to grant the lands to the Indians. The practical contemporary construction which they evidence is highly persuasive of the meaning of the orders. Cf. *United States* v. *Eaton*, 169 U. S. 331, 343.

Four subsequent events confirm this interpretation. First, in the Indian Appropriation Act of 1876, c. 289, 19 Stat. 176, 192, Congress declared that it would make no further gifts to the Sioux unless the Sioux would relinquish part of their reservation and also "all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of" 1868. In September and October of 1876 the Sioux made such an agreement. In November 1876, while this agreement was awaiting ratification by Congress, the fourth executive order was issued. It is impossible to ascribe to the President an intention to grant to the Sioux ownership of a portion of the public domain at the very time when Congress was requiring the Sioux to release every claim to lands outside the original reservation. Nor can the Sioux be supposed to have had a different understanding of these contemporary transactions.

Second, in 1882 the Sioux negotiated an agreement with Commissioners sent out by the Secretary of the Interior, which, if it had been approved by Congress, would have made a new disposition of the entire reservation. At that time part of the lands withdrawn by the executive

orders had not been restored to the public domain. Nevertheless, the agreement provided (H. Ex. Doc. 68, 47th Cong., 2d Sess., pp. 6–7):

> The said Indians do hereby relinquish and cede to the United States all of the Great Sioux Reservation—as reserved to them by the treaty of 1868, and modified by the agreement of 1876—not herein specifically reserved and set apart as separate reservations for them.

This description is plain proof that neither the Sioux nor the Commissioners supposed that the Great Sioux Reservation included the lands set aside by executive order.

Third, in 1888 a new commission was sent out to secure an agreement like the agreement negotiated in 1882. The Commission took with it a map of the Sioux reservation which showed the lands that the Government believed were part of the reservation; the lands covered by the executive orders were not included. S. Ex. Doc. 17, 50th Cong., 2d Sess., pp. 5, 295. The Sioux rejected the agreement. They also disputed the accuracy of the map claiming that it did not show all the lands belonging in the reservation. But they laid no claim to the lands covered by the executive orders; on the contrary, they pointed to the lands on the east bank of the Missouri as open for the white men to settle.—*Id.* at 5, 6, 25, 31, 61, 67, 78, 79, 99, 100.

Fourth, in 1889 when Congress passed the Act of March 2, 1889, c. 405, 25 Stat. 888, reducing the size of the reservation it spoke of persons who had entered upon—

> any part of the Great Sioux Reservation lying east of the Missouri River and known as the Crow Creek and Winnebago Reservation * * *.

Thus Congress indicated again that it believed that no other lands east of the river were a part of the Sioux reservation.

These four events taken together render indisputable our construction of the executive orders for they show that neither the President nor the Congress nor the Sioux themselves believed that the orders conveyed any rights to the Sioux in the lands in question.

III

BY THE AGREEMENT OF 1876 THE SIOUX RELEASED ANY RIGHTS THEY MIGHT HAVE HAD IN THE LANDS COVERED BY THE FIRST THREE EXECUTIVE ORDERS

The Indian Appropriation Act of August 15, 1876, c. 289, 19 Stat. 176, 192, provided that no future appropriation should be made for the subsistence of the Sioux—

> unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight for said Indians; and also so

> much of their said permanent reservation as lies west of the one hundred and third meridian of longitude. * * *

The agreement negotiated with the Sioux and ratified by the Act of February 28, 1877, c. 72, 19 Stat. 254, carried out these conditions. Article 1 of the agreement redefined "the northern and western boundaries of the reservation defined by article 2 of the treaty" of 1868 so as to release the specified portion of the reservation and so as to grant to the Sioux additional land to the north of the reservation.[24] In the remaining portion of Article 1 the Sioux relinquished to the United States "all the territory outside the said reservation, as herein modified and described."

This agreement constituted a release barring any claim by petitioner to the lands covered by the three executive orders issued before its execution.[25]

A. *The release included any rights petitioner might have in the lands here involved.*—In the court below petitioner argued that the lands included in the executive orders had been added to the reservation pursuant to the Treaty of 1868, that they were a part of "said reservation" within the meaning of that term in Article 1 of the 1876 agreement, and, consequently, were not relin-

---

[24] See pp. 7–8, *supra*.

[25] The agreement of 1876 was executed by the Sioux in September and October of 1876, 19 Stat. 257–263 (R. 19). The fourth executive order was signed on November 28, 1876 (R. 13).

quished by that agreement. But this contention ignores the fact that the words "said reservation" refer to the preceding language of Article 1 of the agreement which speaks of the "reservation defined by article 2 of the treaty" of 1868. The correctness of this construction is evident when it is recalled that the 1876 Act required the Sioux to relinquish their rights to any country "outside the boundaries of the permanent reservation established by the treaty." The reservation "established" by the treaty obviously did not include the lands covered by the executive orders, even though the treaty recognized that additions to the reservation might be made. It follows that any rights of the Sioux to these lands were released by the 1876 agreement.

B. *The Agreement of 1876 was valid.*—Article 12 of the Fort Laramie Treaty of 1868 provided:

> No treaty for the cession of any portion or part of the reservation herein described * * * shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; * * *

In reliance upon this article, petitioner may argue, as it asserted in the *Black Hills* case in the Court of Claims,[28] that the 1876 agreement was invalid

---

[28] Another suit filed by petitioner in the Court of Claims, and not yet decided, seeks to recover for an alleged taking of the Black Hills country (the part of the reservation lying

because it was signed by the chiefs and headmen of the various bands of Sioux Indians and not by three-fourths of the adult male Indians.[27] To this contention there are several answers.

1. The question of whether the 1876 agreement was executed in such manner as to bind the Sioux was one for Congress and not for the courts. As guardian of the Indians, the United States has plenary power to control for their benefit the property and affairs of the Indian tribes. And the manner in which Congress chooses to exercise its power as guardian is not subject to review by the courts. *Klamath Indians* v. *United States,*

---

between the one hundred and third and one hundred and fourth meridians) on the ground that the agreement of 1876, by which that country was ceded to the United States, was invalid. In the instant case, petitioner did not contend in the court below that the release was invalid but rather that its validity could not be determined because that precise issue was being litigated in the *Black Hills* case. That fact obviously does not prevent the Government from contending in this case that the agreement is a valid defense to petitioner's claim.

[27] Petitioner also argued in the *Black Hills* case that the agreement was invalid because it was misinterpreted to the Indians and was obtained by misrepresentations. The finding in the instant case that the Indians signed with a full understanding of the conditions of the 1876 Act (R. 19–20) precludes such argument here. And see Sen. Doc. 9, 44th Cong., 2d sess. containing the reports of the Commission which negotiated the agreement. Moreover, the courts do not inquire into the circumstances of the making of such an agreement after it has been approved by Congress. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, discussed *infra*, p. 46.

296 U. S. 244, 252–253, 254–255; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 567–568; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 306–308; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 497; *Chippewa Indians* v. *United States*, 88 C. Cls. 1, 32, affirmed, 307 U. S. 1. Cf. *Seminole Nation* v. *United States*, 92 C. Cls. 210, certiorari denied, 313 U. S. 563; *Creek Nation* v. *United States*, 92 C. Cls. 269, certiorari denied, 313 U. S. 581. Specifically, the question of whether an agreement ceding Indian land is valid notwithstanding that three-fourths of the adult male Indians have not consented to the cession as required by a previous treaty is "solely within the domain of the legislative authority and its action is conclusive upon the courts." *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 568. In the present case, Congress approved and ratified the agreement upon a finding that the Indians who signed it were authorized to act for the tribe. 19 Stat. 254.

2. By Article 5 of the 1876 agreement (see 19 Stat. 254, 256), the United States agreed to furnish rations and other articles to the members of the tribe. Pursuant to this promise, the Government has expended some $37,000,000.[28] Having accepted these benefits over a long period, the Sioux cannot now in good conscience attack as void or ineffec-

[28] A series of acts extending over fifty years which, in most cases, appropriated moneys "as per the agreement" of 1876 are listed in Appendix E, *infra*, p. 60.

tive the terms of the agreement under which they were paid.

3. Section 19 of the Act of March 2, 1889, c. 405, 25 Stat. 888, 896, declared that all the provisions of the 1876 agreement "are hereby continued in force." Section 28 provided that the act should take effect when accepted by the Indians in the manner and form required by Article 12 of the 1868 treaty. On February 10, 1890, the President issued a proclamation declaring that the Indians had accepted the act. 26 Stat. 1554. The acceptance of Section 19 by three-fourths of the adult male Indians constituted a re-execution of the 1876 agreement. It is therefore immaterial whether in 1876 the agreement was signed by the requisite number of Indians.

CONCLUSION

It is respectfully submitted that, for the reasons stated, the judgment of the Court of Claims dismissing the petition should be affirmed.

CHARLES FAHY,
Solicitor General.
NORMAN M. LITTELL,
Assistant Attorney General.
VERNON L. WILKINSON,
JOHN F. COTTER,
ROGER P. MARQUIS,
ARCHIBALD COX,
Attorneys.

APRIL 1942.

APPENDIX A

The material portions of the Treaty of April 29, 1868, ratified February 16, 1869, 15 Stat. 635, are as follows:

ARTICLE II. The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri river where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the government as may be authorized to enter upon Indian reservations in discharge

of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.

ARTICLE XI. In consideration of the advantages and benefits conferred by this treaty and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy permanently the territory outside their reservation as herein defined, but yet reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill river, so long as the buffalo may range thereon in such numbers as to justify the chase.

ARTICLE XII. No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in Article VI of this treaty.

ARTICLE XV. The Indians herein named agree that when the agency house and other

buildings shall be constructed on the reservation named, they will regard said reservation their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right, subject to the conditions and modifications of this treaty, to hunt, as stipulated in Article XI hereof.

ARTICLE XVI. The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians, first had and obtained, to pass through the same; and it is further agreed by the United States, that within ninety days after the conclusion of peace with all the bands of the Sioux nation, the military posts now established in the territory in this article named shall be abandoned, and that the road leading to them and by them to the settlements in the Territory of Montana shall be closed.

APPENDIX B

Executive Orders withdrawing the lands from the public domain are as follows:

January 11, 1875:

> It is hereby ordered that the tract of country in the Territory of Dakota lying within the following described boundaries, viz: Commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same; thence east with said parallel of latitude to the ninety-ninth degree of west longitude; thence south with said degree of longitude to the east bank of the Missouri River; thence up and with the east bank of said river to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

March 16, 1875:

> It is hereby ordered that the tract of country in the Territory of Dakota lying within the following described boundaries, viz, commencing at a point where the one hundred and second degree of west longitude intersects the forty-sixth parallel of north latitude; thence north on said one hundred and second degree of longitude to the south bank of the Cannon Ball River; thence down and with the south bank of said river to a point on the east side of the Missouri River, opposite the mouth of said

Cannon Ball River; thence down and with the east bank of the Missouri River to the mouth of Beaver River; thence up and with the south bank of Beaver River to the one hundredth degree of west longitude; thence south with said one hundredth degree of longitude to the forty-sixth parallel of latitude; thence west with said parallel of latitude to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

May 20, 1875:

It is hereby ordered that that portion of the public domain in the Territory of Dakota lying south of an east and west line from the northwest corner of the Yankton Indian Reservation to the ninety-ninth degree of longitude, and between said longitude and the Missouri River on the west and the Yankton Indian Reservation on the east, be, and the same hereby is, withdrawn from sale and settlement and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

November 28, 1876:

It is hereby ordered that the tract of Country in the Territory of Dakota on the east side of the Missouri River, lying within the following boundaries, viz: Commencing at a point on the south bank of Beaver River, intersected by the one hundredth degree of west longitude; thence in a direct line to the east corner of the Fort Rice Military Reservation; thence in a southwestern direction along the said military reserva-

tion to the east bank of the Missouri River; thence with the east bank of the Missouri River to the mouth of Beaver River; thence up and with the south bank of Beaver River to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation in said Territory.

APPENDIX C

The Executive Orders restoring the lands to the public domain are as follows:

August 9, 1879:

> It is hereby ordered that all that portion of the Sioux Indian Reservation in Dakota Territory created by Executive orders dated January 11, March 16, and May 20, 1875, and November 28, 1876, lying within the following-described boundaries, viz: Beginning at a point where the west line of the Fort Randall Military Reservation crosses the Missouri River; thence up and along said river to the mouth of American Creek; thence up and along said creek to the ninety-ninth degree of west longitude; thence south along said degree to a point due west from the northwest corner of the Yankton Indian Reservation; thence due east to the northwest corner of said reservation; thence due south to the north boundary line of Fort Randall Military Reservation; thence following said boundary line northwesterly to the northwest corner of said military reservation; thence south on the west boundary line of said reservation to the place of beginning. And also the following-described land: Beginning at the east bank of the Missouri River at the mouth of Medicine Knoll Creek; thence up and along the Missouri River to the boundary line of Fort Sully Military Reservation; thence northeasterly along said boundary line to the southeast corner

of said military reservation; thence northwesterly along the boundary line of said reservation to the northeast corner thereof; thence due north to the east bank of the Missouri River; thence up and along the east bank of said river to the mouth of the Bois Cache; thence due north to the east bank of the Missouri River; thence up and along the east bank of said river to the south line of township 129 north; thence east along said township line to the line between ranges 78 and 79 west; thence north along said range line to Beaver Creek, or the north boundary line of the reservation set aside by the Executive Order of March 6, 1875; thence west along said creek to the east bank of the Missouri River; thence up and along said east bank to the southeast corner of Fort Rice Military Reservation; thence northeasterly along said military reservation to the east corner of said reservation; thence in a direct line to a point on the south bank of Beaver Creek where said creek is intersected by the one-hundredth degree of west longitude; thence south with said one-hundredth degree of longitude to the forty-sixth parallel of north latitude; thence east with said parallel of latitude to the ninety-ninth degree of west longitude; thence south with said degree of longitude to its intersection with the north boundary line of the old Sioux or Crow Creek Reservation; thence west along the north boundary line of said reservation to the eastern boundary line of the old Winnebago Reservation; thence north along said east line to the northeast corner of said Winnebago Reservation; thence west along the north boundary line of said reservation to the

middle channel of Medicine Knoll Creek; thence down the middle channel of said creek to the place of beginning, be, and the same hereby is, restored to the public domain.

March 20, 1884:

It is hereby ordered that the lands embraced within the three existing Executive additions to the Great Sioux Reservation, in Dakota, east of the Missouri River, viz, the one opposite the Standing Rock Agency, the one opposite the mouth of Grand River and the site of the old Grand River Agency, and the one opposite the mouth of Big Cheyenne River and the Cheyenne River Agency, be, and the same are hereby, restored to the mass of the public domain, the same being no longer needed for the purpose for which they were withdrawn from sale and settlement.

APPENDIX D

Act of August 15, 1876, c. 289, 19 Stat. 176, 192:

For this amount, for subsistence, including the Yankton Sioux and Poncas, and for purposes of their civilization, one million dollars: *Provided,* That none of said sums appropriated for said Sioux Indians shall be paid to any band thereof while said band is engaged in hostilities against the white people; and hereafter there shall be no appropriation made for the subsistence of said Indians, unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight for said Indians; and also so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude, and shall also grant right-of-way over said reservation to the country thus ceded for wagon or other roads, from convenient and accessible points on the Missouri River, in all not more than three in number; and unless they will receive all such supplies herein provided for, and provided for by said treaty of eighteen hundred and sixty-eight, at such points and places on their said reservation, and in the vicinity of the Missouri River, as the President may designate; and the further sum of twenty thousand dollars is hereby appropriated to be expended under the direction of the President of the United States for the purpose of carrying into effect the foregoing provision: *And provided also,* That

no further appropriation for said Sioux Indians for subsistence shall hereafter be made until some stipulation, agreement, or arrangement shall have been entered into by said Indians with the President of the United States, which is calculated and designed to enable said Indians to become self-supporting: *Provided further,* That the Secretary of the Interior may use of the foregoing amounts the sum of twenty-five thousand dollars for the removal of the Poncas to the Indian Territory, and providing them a home therein, with the consent of said band.

The material portions of the Agreement of 1876, ratified by the Act of February 28, 1877, ch. 72, 19 Stat. 254:

ARTICLE 1. The said parties hereby agree that the northern and western boundaries of the reservation defined by article 2 of the treaty between the United States and different tribes of Sioux Indians, concluded April 29, 1868, and proclaimed February 24, 1869, shall be as follows: The western boundaries shall commence at the intersection of the one hundred and third meridian of longitude with the northern boundary of the State of Nebraska; thence north along said meridian to its intersection with the South Fork of the Cheyenne River; thence down said stream to its junction with the North Fork; thence up the North Fork of said Cheyenne River to the said one hundred and third meridian; thence north along said meridian to the South Branch of Cannon Ball River or Cedar Creek; and the northern boundary of their said reservation shall follow the said South Branch to its intersection with the main Cannon Ball River, and thence

down the said main Cannon Ball River to the Missouri River; and the said Indians do hereby relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described, including all privileges of hunting; and article 16 of said treaty is hereby abrogated.

ARTICLE 2. The said Indians also agree and consent that wagon and other roads, not exceeding three in number, may be constructed and maintained, from convenient and accessible points on the Missouri River, through said reservation, to the country lying immediately west thereof, upon such routes as shall be designated by the President of the United States; and they also consent and agree to the free navigation of the Missouri River.

ARTICLE 3. The said Indians also agree that they will hereafter receive all annuities provided by the said treaty of 1868, and all subsistence and supplies which may be provided for them under the present or any future act of Congress, at such points and places on the said reservation, and in the vicinity of the Missouri River, as the President of the United States shall designate.

APPENDIX E

Acts Appropriating Subsistence for Sioux pursuant to Agreement of 1876:

March 3, 1877, c. 101, 19 Stat. 271, 287	$1,125,000.00
May 27, 1878, c. 142, 20 Stat. 63, 80	1,125,000.00
February 17, 1879, c. 87, 20 Stat. 295, 310	1,005,000.00
May 11, 1880, c. 85, 21 Stat. 114, 127	1,000,000.00
March 3, 1881, c. 137, 21 Stat. 483, 491	1,000,000.00
May 17, 1882, c. 163, 22 Stat. 68, 80	1,075,000.00
March 1, 1883, c. 61, 22 Stat. 433, 444	1,375,000.00
July 4, 1884, c. 180, 23 Stat. 76, 87	1,225,000.00
March 3, 1885, c. 341, 23 Stat. 362, 375	1,250,000.00
May 15, 1886, c. 333, 24 Stat. 29, 39	1,200,000.00
March 2, 1887, c. 320, 24 Stat. 449, 459	1,000,000.00
June 29, 1888, c. 503, 25 Stat. 217, 228	1,000,000.00
March 2, 1889, c. 412, 25 Stat. 980, 992	900,000.00
August 19, 1890, c. 807, 26 Stat. 336, 348	950,000.00
March 3, 1891, c. 543, 26 Stat. 989, 1002	1,100,000.00
July 13, 1892, c. 164, 27 Stat. 120, 132	1,225,000.00
March 3, 1893, c. 209, 27 Stat. 612, 624	1,150,000.00
August 15, 1894, c. 290, 28 Stat. 286, 300	1,000,000.00
March 2, 1895, c. 188, 28 Stat. 876, 888	1,000,000.00
June 10, 1896, c. 398, 29 Stat. 321, 333	1,000,000.00
June 7, 1897, c. 3, 30 Stat. 62, 74	900,000.00
July 1, 1898, c. 545, 30 Stat. 571, 582	900,000.00
March 1, 1899, c. 324, 30 Stat. 924, 935	900,000.00
May 31, 1900, c. 598, 31 Stat. 221, 232	900,000.00
March 3, 1901, c. 832, 31 Stat. 1058, 1069	900,000.00
May 27, 1902, c. 888, 32 Stat. 245, 254	850,000.00
March 3, 1903, c. 994, 32 Stat. 982, 990	850,000.00
April 21, 1904, c. 1402, 33 Stat. 189, 199	850,000.00
March 3, 1905, c. 1479, 33 Stat. 1048, 1055	700,000.00
June 21, 1906, c. 3504, 34 Stat. 325, 371	600,000.00
March 1, 1907, c. 2285, 34 Stat. 1015, 1048	877,500.00
April 30, 1908, c. 153, 35 Stat. 70, 94	500,000.00
March 3, 1909, c. 263, 35 Stat. 781, 810	500,000.00
April 4, 1910, c. 140, 36 Stat. 269, 283	350,000.00
March 3, 1911, c. 210, 36 Stat. 1058, 1072	350,000.00
August 14, 1912, c. 388, 37 Stat. 518, 536	350,000.00
June 30, 1913, c. 4, 38 Stat. 77, 95	200,000.00
August 1, 1914, c. 222, 38 Stat. 582, 603	200,000.00

May 18, 1916, c. 125, 39 Stat. 123, 151	$200,000.00
March 2, 1917, c. 146, 39 Stat. 969, 987	200,000.00
May 25, 1918, c. 86, 40 Stat. 561, 585	200,000.00
June 30, 1919, c. 4, 41 Stat. 3, 26	200,000.00
February 14, 1920, c. 75, 41 Stat. 408, 429	193,000.00
March 3, 1921, c. 119, 41 Stat. 1225, 1244	273,000.00
May 24, 1922, c. 199, 42 Stat. 552, 577	273,000.00
January 24, 1923, c. 42, 42 Stat. 1174, 1198	273,000.00
June 5, 1924, c. 264, 43 Stat. 390, 410	258,000.00
March 3, 1925, c. 462, 43 Stat. 1141, 1160	229,574.00
May 10, 1926, c. 277, 44 Stat. 453, 473	214,574.00
January 12, 1927, c. 27, 44 Stat. 934, 953	214,574.00

U. S. GOVERNMENT PRINTING OFFICE: 1943

SUPREME COURT OF THE UNITED STATES.

No. 798.—October Term, 1941.

The Sioux Tribe of Indians, Petitioner, vs. The United States. } On Writ of Certiorari to the United States Court of Claims.

[May 11, 1942.]

Mr. Justice Byrnes delivered the opinion of the Court.

This is an action to recover compensation for some 5½ million acres of land allegedly taken from the petitioner tribe in 1879 and 1884. The suit was initiated under the Act of June 3, 1920 (41 Stat. 738) permitting petitioner to submit to the Court of Claims any claims arising from the asserted failure of the United States to pay money or property due, without regard to lapse of time or statutes of limitation. The Court of Claims denied recovery (— F. Supp. —), and we brought the case here on certiorari (— U. S. —).

The facts as found by the Court of Claims are as follows:

In 1868 the United States and the Sioux Tribe entered into the Fort Laramie Treaty (15 Stat. 635). By Article II of this treaty a certain described territory, known as the Great Sioux Reservation and located in what is now South Dakota and Nebraska, was "set apart for the absolute and undisputed use and occupation" of the Tribe. The United States promised that no persons, other than government officers and agents discharging their official duties, would be permitted "to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians." For their part, the Indians relinquished "all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid." No question arises in this case with respect to the lands specifically included within the Reservation by this treaty.

The eastern boundary of the Great Sioux Reservation, as constituted by the Ft. Laramie Treaty, was the low water mark on

the east bank of the Missouri River.[1] The large tract bordering upon and extending eastward from the east bank of the river remained a part of the public domain open to settlement and afforded easy access to the Reservation. As a result great numbers of white men "infested" the region for the purpose of engaging in the liquor traffic. Anxiety over this development led the Commissioner of Indian Affairs on January 8, 1875 to suggest to the Secretary of the Interior that he request the President to issue an executive order withdrawing from sale and setting apart for Indian purposes a certain large tract of the land along the eastern bank of the Missouri River. In the Commissioner's letter to the Secretary of the Interior, and in the latter's letter of January 9th to the President, the reason advanced for the proposed executive order was that it was "deemed necessary for the suppression of the liquor traffic with the Indians upon the Missouri River." On January 11, 1875, the President signed the suggested order. It described the territory affected and provided that it "be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Sioux Indians as an addition to their present reservation." On two occasions thereafter, once in February and again in May, white persons who had settled on the land in question prior to the issuance of the executive order and who feared that its effect was to deprive them of their holdings, were informed by the Commissioner of Indian Affairs that the object of the executive order was "to enable the suppression of the liquor traffic with the Indians on the Missouri River," that it did not affect the existing rights of any persons in the area, that it was not "supposed that the withdrawal will be made permanent," and that no interference with the peaceful occupancy of the territory had been intended.

On March 13, 1875, the Commissioner of Indian Affairs addressed another letter to the Secretary of the Interior. In it he recommended that the Secretary request the President to withdraw from sale and set apart for Indian purposes another tract of land bordering the Great Sioux Reservation, this time to the north and northeast. The reason given was similar to that for which the first order had been sought: "viz: the suppression of

[1] The Great Sioux Reservation also included two small theretofore existing reservations located on the east bank of the river. They are of no consequence so far as the present dispute is concerned.

the liquor traffic with Indians at the Standing Rock Agency". As a "further reason for said request" the Commissioner stated that "the Agency buildings, as now located at Standing Rock, are outside the reservation as defined by [the Fort Laramie] treaty . . . but are included in the tract proposed to be withdrawn." The Secretary forwarded the Commissioner's report to the President with his concurrence, repeating that the "enlargement of the Sioux reservation in Dakota" was "deemed necessary for the suppression of the liquor traffic with the Indians at the Standing Rock Agency." On March 16, 1875 the President issued a second executive order describing the tract of land involved and declaring that it "be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of the Sioux Indians as an addition to their present reservation in said Territory."

In mid-May of 1875 the Secretary of War transmitted to the Secretary of the Interior a letter from the officer in command of the Southern District of the Military Department of Dakota in which it was pointed out that a small tract of land along the eastern bank of the Missouri River opposite the southern corner of the Sioux Reservation was still open to settlement and afforded "a very nice point for whiskey sellers and horse thieves". Upon the basis of this letter, the Commissioner recommended to the Secretary of the Interior and the Secretary recommended to the President the issuance of still a third executive order withdrawing the described tract from settlement. On May 20, 1875 the executive order was issued in the same form as its two predecessors.

Finally upon a similar complaint from the Acting Agent of the Standing Rock Agency that a small piece of land to the north of the reservation was being used as a base of operations by persons selling liquor and ammunition to the Sioux Indians, the Commissioner of Indian Affairs and the Secretary of the Interior recommended a further order to "effectually cut off these whiskey dealers". In his letter to the Secretary dated November 24, 1876, the Commissioner stated: "It is not proposed to interfere with the vested rights, or the legitimate business of any settler who may be upon this tract." The President issued a fourth executive order in the usual form on November 28, 1876. On December 13, 1876 the Commissioner notified the agent at Standing Rock that

the order had been issued, and added that it was "not intended to interfere with the vested rights of any settler upon the tract or with the legitimate business pursuits of any person lawfully residing within its limits."

About two and a half years after the last of these four executive orders withdrawing lands from sale and setting them apart for the use of the Sioux, the Commissioner of Indian Affairs submitted to the Secretary of the Interior a report upon a suggestion that the orders be modified so as to permit the return of the lands to the public domain. The report, dated June 6, 1879, reviewed the problems arising from the liquor trade during the years following the Fort Laramie treaty, recalled that the purpose of the four executive orders of 1875 and 1876 had been to eliminate this traffic, observed that they had "to a great extent accomplished the object desired, viz: the prevention of the sale of whiskey to the Indians", and concluded that any change in the boundaries established by the executive orders would "give renewed life to this unlawful traffic, and be detrimental to the best interests of the Indians".

Three weeks later, however, upon reconsideration, the Commissioner informed the Secretary that in his opinion the lands included in the executive orders of 1875 and 1876 might be "restored to the public domain, and the interests of the Indians still be protected." In explanation he stated:

"These lands were set apart for the purpose, as alleged, of preventing illegal liquor traffic with the Indians. At the time, said lands were set apart there was no law providing a punishment for the sale of liquor to Indians, 'except to Indians in the Indian country', but, by the Act of February 27, 1877, (19 Stat. 244) persons who now engage in liquor traffic with Indians, no matter in what locality, are liable to a penalty of $300, and two years imprisonment, and, therefore, the necessity for so large a reservation for the protection of these Indians, in this repsect [*sic*] does not now exist."[2]

Accordingly, he recommended that the lands withdrawn from sale by the President in 1875 and 1876 be returned to the public domain with the exception of three small tracts directly opposite the Cheyenne, Grand River, and Standing Rock agencies. On August 9, 1879 an executive order to this effect was promulgated and the land with the exceptions indicated was "restored to the public

[2] Letter from Commissioner to Secretary of the Interior, dated June 27, 1879.

domain". Five years later the Commissioner informed the Secretary that the Grand River Agency had ceased to exist and that the agents at Cheyenne and Standing Rock considered it no longer necessary to withhold the tracts opposite their agencies from the public domain "for the purpose for which they have thus far been retained." Consequently, an executive order was prepared and signed by the President on March 20, 1884, restoring these three small pieces of land to the public domain, "the same being no longer needed for the purpose for which they were withdrawn from sale and settlement."

One additional event remains to be noted. In the Indian Appropriation Act for 1877, approved August 15, 1876, (19 Stat. 176, 192), Congress provided:

" . . . . hereafter there shall be no appropriation made for the subsistence of said Indians [i.e., the Sioux], unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight [the Fort Laramie treaty] for said Indians; and also so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude [the western boundary set by the Fort Laramie treaty had been the 104th meridian], and shall also grant right of way over said reservation to the country thus ceded for wagon or other roads, from convenient and accessible points on the Missouri River . . . ."

On September 26, 1876—a date subsequent to the first three of the four executive orders setting apart additional lands for the use of the Sioux, but about two months prior to the last of those orders—the Sioux Tribe signed an agreement conforming to the conditions imposed by Congress in the Indian Appropriation Act and promised to "relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described . . . ."[3]

Petitioner's position is that the executive orders of 1875 and 1876 were effective to convey to the Tribe the same kind of interest in the lands affected as it had acquired in the lands covered by the Fort Laramie Treaty, that the executive orders of 1879 and 1884 restoring the lands to the public domain deprived petitioner of this interest, and that it is entitled to be compensated for the fair value of the lands as of 1879 and 1884. The government

[3] This treaty was ratified by the Act of February 28, 1877 (19 Stat. 254).

defends on several grounds: *first*, that in general the President lacked authority to confer upon any individual or group a compensable interest in any part of the public domain; *second*, that even if he had the power to convey such a compensable interest, the President did not purport to do so in this case; and *third*, that in any event by the treaty of 1876 the Sioux relinquished whatever rights they may have had in the lands covered by the first three of the four executive orders.

Section 3 of Article IV of the Constitution confers upon Congress exclusively "the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Nevertheless, "from an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses." *Grisar* v. *McDowell*, 6 Wall. 363, 381. As long ago as 1830 Congress revealed its awareness of this practice and acquiesced in it.[4] By 1855 the President had begun to withdraw public lands from sale by executive order for the specific purpose of establishing Indian reservations.[5] From that date until 1919,[6] hundreds of reservations for Indian occupancy and for other purposes were created by executive order. Department of the Interior, *Executive Orders Relating to Indian Reservations, passim*; *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 469-470. Although the validity of these orders was occasionally questioned,[7] doubts were quieted in *United States* v. *Midwest Oil Co., supra.* In that case it was squarely held that even in the absence of express statutory authorization, it lay within the power of the President to withdraw lands from the public domain. Cf. *Mason* v. *United States*, 260 U. S. 545.

---

[4] The Pre-emption Act of May 29, 1830, excluded from its provisions "any land which is reserved from sale by Act of Congress, or by order of the President." 4 Stat. 420, 421. "Lands included in any reservation by any treaty, law, or proclamation of the President" were excluded from the operation of the Pre-emption Act of September 4, 1841. 5 Stat. 453, 456.

[5] Cohen, *Handbook of Federal Indian Law* (1941) 299; Department of the Interior, Executive Orders Relating to Indian Reservations, Vol. I, p. 79.

[6] By § 27 of the Act of June 30, 1919, Congress declared that thereafter "no public lands of the United States shall be withdrawn by Executive Order, proclamation, or otherwise, for or as an Indian reservation except by Act of Congress." 41 Stat. 3, 34. In 1927 Congress added a provision that any future changes in the boundaries of executive order reservations should be made by Congress alone. § 4, 44 Stat. 1347.

[7] See 14 Op. A. G. 181 (1873). But *cf.* 17 Op. A. G. 258 (1882).

The government therefore does not deny that the executive orders of 1875 and 1876 involved here were effective to withdraw the lands in question from the public domain. It contends, however, that this is not the issue presented by this case. It urges that instead we are called upon to determine whether the President had the power to bestow upon the Sioux Tribe an interest in these lands of such a character as to require compensation when the interest was extinguished by the executive orders of 1879 and 1884. Concededly, where lands have been reserved for the use and occupation of an Indian Tribe by the terms of a treaty or statute, the tribe must be compensated if the lands are subsequently taken from them. *Shoshone Tribe* v. *United States*, 299 U. S. 476; *United States* v. *Shoshone Tribe*, 304 U. S. 111; *United States* v. *Klamath Indians*, 304 U. S. 119. Since the Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey any interest in these lands must be traced to Congressional delegation of its authority. The basis of decision in *United States* v. *Midwest Oil Co.* was that, so far as the power to withdraw public lands from sale is concerned, such a delegation could be spelled out from long continued Congressional acquiescence in the executive practice. The answer to whether a similar delegation occurred with respect to the power to convey a compensable interest in these lands to the Indians must be found in the available evidence of what consequences were thought by the executive and Congress to flow from the establishment of executive order reservations.[8]

---

[8] This question is an open one. It is true that language appearing in two decisions of this Court suggests that the tribal title to a reservation is the same whether the reservation has been created by statute or treaty or by executive order. Re Wilson, 140 U. S. 575, 577; Spalding v. Chandler, 160 U. S. 394, 403. Cf. C. N. Cotton, 12 L. D. 205 (1899); William F. Tucker et al., 13 L. D. 628 (1891). In Re Wilson, however, it was conceded by all concerned that an executive order reservation was "Indian country" within the meaning of that term as it appeared in certain statutes defining the criminal jurisdiction of United States courts and territorial courts. No question was raised by the case with respect to the character of the tribe's interest in the reservation. Moreover, the dictum referred to was based upon the assumption that the Allotment Act of 1887 (24 Stat. 388) amounted to a Congressional recognition of tribal title to executive order reservations. The invalidity of this assumption is demonstrated in a later portion of our opinion. The issue in Spalding v. Chandler concerned the effect of the Pre-emption Act of September 4, 1841 (5 Stat. 453) upon an Indian reservation created by treaty and preserved by executive order and did not involve a determination of whether the Indians enjoyed a compensable interest in an executive order reservation. And twenty-eighty years thereafter when the Attorney General ruled, on the authority of United States v. Midwest Oil Co., that executive order reservations

It is significant that the executive department consistently indicated its understanding that the rights and interests which the Indians enjoyed in executive order reservations were different from and less than their rights and interests in treaty or statute reservations. The annual reports of the Commissioner of Indian Affairs during the years when reservations were frequently being established by executive order contain statements that the Indians had "no assurance for their occupation of these lands beyond the pleasure of the Executive,"[9] that they "are mere tenants at will, and possess no permanent rights to the lands upon which they are temporarily permitted to remain,"[10] and that those occupying land in executive order reservations "do not hold it by the same tenure with which Indians in other parts of the Indian Territory possess their reserves."[11]

Although there are abundant signs that Congress was aware of the practice of establishing Indian reservations by executive order, there is little to indicate what it understood to be the kind of interest that the Indians obtained in these lands. However, in its report in 1892 upon a bill to restore to the public domain a portion of the Colville executive order reservation, the Senate Committee on Indian Affairs expressed the opinion that under the executive order "the Indians were given a license to occupy the lands described in it so long as it was the pleasure of the Government that they should do so, and no right, title, or claim to such lands has vested in the Indians by virtue of this occupancy."[12]

---

were not a part of the public domain for purposes of the General Leasing Act of 1920 (41 Stat. 437), he took occasion to remark: "Whether the President might legally abolish, in whole or in part, Indian reservations once created by him, has been seriously questioned (12 L. D. 205; 13 L. D. 628) and not without strong reasons; for the Indian rights attach when the lands are thus set aside; and moreover, the lands then at once become subject to allotment under the General Allotment Act. Nevertheless, the President has in fact, and in a number of instances, changed the boundaries of executive order reservations by excluding lands therefrom, *and the question of his authority to do so has not apparently come before the courts.*" 34 Op. A. G. 171, 176 (emphasis added).

[9] Annual Report of Commissioner of Indian Affairs (1872), H. R. Exec. Doc., 42d Cong., 3d Sess., Vol. III, No. 1, part 5, p. 472.

[10] *Id.* (1878), H. R. Exec. Doc., 46th Cong., 3d Sess., Vol. IX, No. 1, part 5, p. 486; *id.* (1880), H. R. Exec. Doc., 46th Cong., 3d Sess., Vol. IX, No. 1, part 5, p. 96.

[11] *Id.* (1886), H. R. Exec. Doc., 49th Cong., 2d Sess., Vol. 8, No. 1, part 5, p. 88.

[12] S. Rep. No. 664, 52d Cong., 1st Sess., p. 2.

Petitioner argues that its position finds support in Section 1 of the General Allotment Act of February 8, 1887,[13] which provides:

"That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and, he hereby is, authorized . . . to cause said reservation . . . to be surveyed . . . and to allot the lands in said reservation in severalty to any Indian located thereon . . . ."

By Section 5 provision was made for issuance of patents to the allottees by which the United States promised to hold the lands in trust for the allottees and their heirs for 25 years and thereafter to convey to them full title. Petitioner urges that by including executive order reservations within the provisions of this Act, Congress revealed its belief that the degree of ownership enjoyed by Indian tribes is identical whether the reservation is created by treaty, statute, or executive order. But there is much to contradict this interpretation. For example, during the course of the debate on the measure Senator Dawes, a member of the Committee reporting the bill, frequently distinguished between the character of title enjoyed by the Indians on statute and treaty reservations and that enjoyed by those on executive order reservations, and no exception was taken to his remarks. 17 Cong. Rec. 1559, 1630, 1631, 1763. Moreover, in its 1892 report on the bill to abolish a portion of the Colville reservation, to which we have referred, the Senate Committee on Indian Affairs explained:

"An erroneous idea seems to have grown up, that the Indian allotment act [of 1887] and its amendments have given additional sanctions to executive reservations, and operated to confer titles upon the Indians occupying them they did not before possess. . . . At the time of the enactment of this statute, there were fifty-six executive reservations, embracing perhaps from 75,000,000 to 100,000,000 acres of the public lands, in which the Indians had no right or claim of title and which could be extinguished by act of the President. It would be preposterous to place such a construction upon the language of this act as would divest the United States of its title to these lands."[14]

---

[13] 24 Stat. 388.

[14] S. Rep. No. 664, 52d Cong., 1st Sess., p. 2.

This statement by the Committee which reported the general Allotment Act of 1887, made within five years of its passage, is virtually conclusive as to the significance of that Act. We think that the inclusion of executive order reservations meant no more than that Congress was willing that the lands within them should be allotted to individual Indians according to the procedure outlined. It did not amount to a recognition of tribal ownership of the lands prior to allotment. Since the lands involved in the case before us were never allotted—indeed, the executive orders of 1879 and 1884 terminated the reservation even before the Allotment Act was passed,—we think the Act has no bearing upon the issue presented.

Perhaps the most striking proof of the belief shared by Congress and the executive that the Indians were not entitled to compensation upon the abolition of an executive order reservation is the very absence of compensatory payments in such situations. It was a common practice during the period in which reservations were created by executive order for the President simply to terminate the existence of a reservation by cancelling or revoking the order establishing it. That is to say, the procedure followed in the case before us was typical. No compensation was made, and neither the government nor the Indians suggested that it was due.[15] It is true that on several of the many occasions when Congress itself abolished executive order reservations, it provided for a measure of compensation to the Indians. In the Act of July 1, 1892, restoring to the public domain a large portion of the Colville reservation[16] and in the Act of February 20, 1893 restoring a portion of the White Mountain Apache Indian Reservation,[17] Congress directed that the proceeds from the sale of the lands be used for the benefit of the Indians. But both acts contained an explicit proviso: "That nothing herein contained shall be construed as recognizing title or ownership of said Indians to any part of said . . . Reservation, whether that hereby restored to the public domain or that still reserved by the government for their use and occupancy." Consequently, the granting of compensation must be regarded as an act of grace rather than a recognition of an obligation.

---

[15] See, *e. g.*, Department of the Interior, *Executive Orders Relating to Indian Reservations*, Vol. I, pp. 5, 6, 21, 30, 37, 43, 44, 48-50; Hearings before a Subcommittee of the Committee on Indian Affairs on S. 1722 and S. 3159, 69th Cong., 1st Sess., pp. 104-105.

[16] 27 Stat. 62, 63.

[17] 27 Stat. 469, 470.

We conclude therefore that there was no express constitutional or statutory authorization for the conveyance of a compensable interest to petitioner by the four executive orders of ~~1874~~ 1875, and ~~1875~~, and that no implied Congressional delegation of the power to do so can be spelled out from the evidence of Congressional and executive understanding. The orders were effective to withdraw from sale the lands affected and to grant the use of the lands to the petitioner. But the interest which the Indians received was subject to termination at the will of either the executive or Congress and without obligation to the United States. The executive orders of 1879 and 1884 were simply an exercise of this power of termination and the payment of compensation was not required.

Affirmed.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.